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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9851

HELEN R. BRYAN, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the District Court of the United States for the District of Columbia

JOINT APPENDIX

* * * *

104 Filed in Open Court March 31 1947

Charles E. Stewart, Clerk

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
Holding a Criminal Term
January Term, 1947
UNITED STATES OF AMERICA v. HELEN R. BRYAN
Criminal No. 365-47
Grand Jury Original
Violation 192, Title 2 U. S. C.
(Contempt of House of Representatives)

The Grand Jury charges:

Pursuant to House Resolution 5 of the House of Representatives of the United States, 79th Congress, dated January 3, 1945, including the rules of Congress therein adopted and amended, the House of Representatives was empowered to and did create the Committee on Un-Ameri-

can Activities, having duties and powers as set forth in said Resolution.

Helen R. Bryan was summoned as a witness by authority of the House of Representatives, through its Committee on Un-American Activities, to produce before the said Committee, records upon the matter under inquiry committed to the said Committee by the Resolution aforesaid, that is to say, all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946. She appeared before said Committee at its session in the District of Columbia on April 4, 1946, but then and there refused to produce the said records upon the matter under inquiry, and thereby wilfully made default.

George Morris Fay
Attorney of the United States in
and for the District of Columbia.

A True Bill:
Helen M. Hoffman
Foreman

• • • •

105 Filed Apr 21 1947 Charles E. Stewart, Clerk

SIR:

PLEASE TAKE NOTICE that upon the affidavit of O. John Rogge, Esquire, duly verified the 19th day of April, 1947, upon the indictment found against the defendant and upon all the proceedings heretofore had herein, a motion will be made at a term of this Court held at the United States District Courthouse in Washington, D. C., on the 25th day of April, 1947, at the opening of Court on that day, or as soon thereafter as counsel can be heard

for an order directing the United States District Attorney to serve and file a Bill of Particulars of the above-described indictment setting forth the following:

1. Of what acts or actions did the alleged wilful default of the defendant consist as charged in the Indictment.

II. What is or constitutes the alleged matter under inquiry committed to the said Committee by the resolution set forth in said indictment.

III. How did the records referred to in the Indictment bear upon the matter under inquiry referred to in said indictment.

106 And for such other and further relief as to the Court may seem just and proper.

Dated: April 19, 1947.

Yours, etc.
O. John Rogge
O. John Rogge
160 Broadway
New York 7, N. Y.
WO 2-1437
Wolf, Popper, Ross & Wolf
By Benedict Wolf
160 Broadway
New York 7, N. Y.
WO 2-1437
Attorneys for Petitioner

To: Hon. George Morris Fay
United States District Attorney
District of Columbia

• • • •

107 Filed Apr 21 1947 Charles E. Stewart, Clerk

STATE OF NEW YORK SS:
COUNTY OF NEW YORK

O. John Rogge, being duly sworn deposes and says:

1. That he is one of the attorneys for the defendant named in the above bill of indictment.

2. That your deponent makes this affidavit since he has consulted and conferred with the said defendant with respect to the charges in the bill of indictment and is apprised of the information possessed by said defendant with respect to the charges in said indictment.

3. That this application is made in good faith for the purpose of informing the defendant of the particular offenses upon which she stands charged and to which she must anwer.

4. That the defendant cannot properly answer the charges set forth in said indictment without the additional information asked for in said request for a bill of particulars.

108 5. That the indictment is so vague and general that the defendant cannot properly prepare her defense without further specifications asked for in said request for a bill of particulars.

O. John Rogge
O. John Rogge

Sworn to before me this
19th day of April, 1947.
Ida K. Ellenbogen
Ida K. Ellenbogen
Notary Public, State of New York
Residing in Bronx County
Bronx Co. Clks. No. 38, Reg. No. 83-E-8
N. Y. Co. Clks. No. 224, Reg. No. 229-E-8
Kings Co. Clks. No. 71, Reg. 155-E-8
Commission Expires March 30, 1948

* * * *

109 *Bill of Particulars*

The United States Attorney, responding to the order of the Court of this 25th day of April, 1947, that he file a bill of particulars as requested in Item II of the request of the defendant for bill of particulars as to "What is or constitutes the alleged matter under inquiry com-

mitted to the said Committee by the resolution set forth in said indictment", states as follows:

At the time Helen R. Bryan was summoned as a witness as alleged in the indictment, the Committee on Un-American Activities of the House of Representatives was engaged in that part of its investigation which concerned the activities of the Joint Anti-Fascist Refugee Committee, an unincorporated association, of which the defendant, Miss Bryan, was Executive Secretary.

George Morris Fay
George Morris Fay
United States Attorney
Charles B. Murray
Charles B. Murray
Assistant United States
Attorney

I hereby certify that I have this 25th day of April, 1947, sent a copy of the foregoing bill of particulars by official United States mail to O. John Rogge, Esquire, and Benedict Wolf, Esquire, attorneys for defendant, at their address 160 Broadway, New York, New York.

Charles B. Murray,
Charles B. Murray,
Assistant United States
Attorney

• • • •

110 Filed May 5 1947 Charles E. Stewart, Clerk

Motion to Dismiss Indictment

The defendant moves that the indictment be dismissed on the following grounds:

1. The indictment does not state an offense against the United States if House Resolution #5, 79th Congress, establishing the Committee is unconstitutional.

2. The indictment does not state an offense against the United States since the House Resolution is unconstitutional in that it violates Article I, Section 1; Article I, Section 8, Paragraph 18; and the Ninth and Tenth Amendments of the United States Constitution.

3. The indictment does not state an offense against the United States in that the aforementioned House Resolution, which is enforceable by the penal sanctions contained in Section 192 of Title 2 of the United States Code, does not provide the ascertainable standard of guilt required by the Fifth and Sixth Amendments of the United States Constitution.

4. The indictment does not state an offense against the United States since the House Resolution "is so vague and indefinite as to permit the punishment of the fair use" of freedom of expression and therefore violates the First Amendment to the Constitution of the United States.

111 5. The indictment does not state an offense against the United States since the investigation authorized by the aforesaid Resolution contemplates legislation which would be unconstitutional under the First Amendment of the United States Constitution and the Resolution is therefore unconstitutional under Article I, Section 1; Article I, Section 8, Paragraph 18 and the Ninth and Tenth Amendments of the United States Constitution.

6. The indictment does not state an offense against the United States since the aforesaid Resolution violates the Fifth Amendment of the United States Constitution in that the Committee has so administered the Resolution "as practically to make unjust and illegal discrimination between persons."

7. The indictment fails to charge an offense against the United States since no default of subpoena served or to be served took place; the printed and written document which was served on the defendant and which purported to be a subpoena duces tecum was in fact a direction to the Sergeant at Arms or his special messenger requiring him

to summon the defendant and this written and printed document was served in lieu of a valid subpoena.

8. The second count of the indictment does not charge an offense against the United States in that the alleged subpoena duces tecum served on the defendant by its terms constituted an unreasonable search and seizure
112 and was invalid under the Fourth Amendment.

And for such other and further relief as to the Court may seem just and proper.

Dated: May 3, 1947.

O. John Rogge
O. John Rogge
160 Broadway
New York 7, N. Y.
WO 2-1437
Wolf, Popper, Ross & Wolf
By Benedict Wolf
160 Broadway
New York 7, N. Y.
WO 2-1437
Attorneys for Petitioner

* * * *

113 Filed May 21 1947 Charles E. Stewart, Clerk

Opinion

Indictments under U. S. Code, Title 2, sec. 192, for failure to produce documents subpoenaed by the House Committee on Un-American Activities; and for conspiracy to violate U. S. Code, Title 2, Sec. 192. On motions to dismiss indictments. Motions denied.

114 Charles A. Horsky, Esq., Washington, D. C., for the defendant Richard Morford, for the motion.

Abraham J. Isserman, Esq., Washington, D. C., for the defendant George Marshall, for the motion.

O. John Rogge, Esq., New York, N. Y., for the defendant Helen R. Bryan, and the defendants Edward K. Barsky et al., for the motion.

George Morris Fay, Esq., United States Attorney, and Charles B. Murray, Esq., Assistant United States Attorney, both of Washington, D. C., opposed.

In January 1945 the House of Representatives of the United States, by House Resolution No. 5, 79th Congress, 1st Session, created a Committee known as the Committee on Un-American activities, which was authorized to make investigations of "(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

The defendants Richard Morford, George Marshall and Helen Bryan, have been indicted under U. S. Code, Title 2, Sec. 192,[1] for failure to comply with subpoenas *duces tecum*
115 Issued by the Committee and directing them to produce certain records before the Committee.

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1. U. S. Code, Title 2, Sec. 192, reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one more nor more than 12 months."

The indictment against Richard Morford alleges that he was subpoenaed to produce "all books, records, papers and documents showing all the receipts and disbursements of money by the National Council of American-Soviet Friendship, Inc., and all correspondence, memoranda and communications with any and all persons, together with a complete list of all affiliated organizations, for the year 1945."

The indictment against the defendant, George Marshall, alleges that she was subpoenaed to produce "all books, records, documents and correspondenec pertaining to the National Federation for Constitutional Liberties relating to the solicitation and disbursement of funds with a list of contributors." This indictment also charges the defendant Marshall with refusal to answer questions as to whether he had any connection with an organization known as the Marshall Foundation.

The indictment against the defendant Helen R. Bryan alleges that she was subpoenaed to prodce "all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946."

The indictment against the defendants Edward K. Barsky and other consists of two counts. The first count avers that they were members of the Executive Board of the Joint Anti-Fascist Refugee Committee, and charges them with a conspiracy to defraud the United States
116 by encouraging the defendant Helen R. Bryan to refuse to produce records before the Committee; and further with a conspiracy to violate U. S. Code, Title 2, Sec. 192.

The second count of this indictment charges the defendants with the substantive offense of failure to comply with a subpoena directing them to produce "all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or any subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946."

The defendants now move to dismiss the indictments for alleged failure to state an offense against the United States.

The principal contention advanced by the defendants is that the House Resolution under which the Committee acted, is invalid.

It is elementary that for use in connection with the exercise of its power to legislate and to appropriate funds, the Congress has the authority to secure information. Ordinarily legislation cannot be intelligently enacted without previously ascertaining facts from which conclusions can be drawn as to whether need for legislation exists and, if so, what form the legislation should assume. Similarly, detailed data are necessary in connection with the appropriation of moneys. Historically the control of the purse is one of the basic and vital functions of the legislative branch of the Government. Whenever necessary or desirable the Congress may secure the requisite facts by study and research, or by procuring information from persons who volunteer it. The Congress, however, is not limited to these sources of knowledge. It has the right to compel the disclosure of factual material. At times this is the only method by which necessary data can be obtained. For this purpose, the Congress may issue subpoenas to require the attendance of witnesses and to exact the production of records and documents. When resort is had to this course, the customary practice is to delegate the duty to a Committee.

117

Manifestly, the sole purpose for which the Congress may carry on investigations and secure information is in connection with the exercise of its legislative function and with the appropriation of moneys. It may not, for example, compel the divulgence of information for the purpose of ascertaining whether a crime has been committed as a basis for a criminal prosecution, since this is a matter for the judiciary and for the prosecuting officers of the Government. On the other hand, if the same information is desired for use in connection with legislation, the Congress has a right to demand it. The information sought to be secured by a Congressional Committee must be germane to the legislative or the appropriating function.

In connection with the exercise of these powers, however, the Congress is not limited to securing information precisely and directly bearing on some proposed measure, the enactment of which is contemplated or considered. The collection of facts may cover a wide field. Obviously in order to act in an enlightened manner, it may be necessary and desirable for the Congress to become ac-
118 quainted not only with the precise topic involved in prospective legislation, but also with all matters that may have an indirect bearing on the subject. For example, in connection with the regulation of interstate commerce, it may conceivably become desirable for Congress to secure facts bearing solely on some aspects of intrastate commerce. Or, in enacting criminal legislation, it may first become desirable to investigate conditions in States and localities involving violations of local law. In connection with appropriating funds and determining what allotments of moneys should be made, it may become desirable to obtain information covering a wide range. While the power of the Congress to carry on investigations is not without limit, nevertheless, the Congress has broad discretion in determining the subject matter of the study and the scope and extent of the inquiry. If the subject under scrutiny may have any possible relevancy and ma-

teriality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter. Moreover, the relevancy and the materiality of the subject matter must be presumed. The burden is on one who maintains the contrary to establish his contention. It would be intolerable if the judiciary were to intrude into the activities of the legislative branch of the Government, and virtually stop the progress of an investigation, which is intended to secure information that Congress deems necessary and desirable in the proper exercise of its functions, unless the lack of materality and relevancy of the subject matter is clear and manifest.

The authorities unanimously and conclusively support the foregoing views. Thus, in *McGrain v. Daugherty*, 273 U. S. 135, 174-175, Mr. Justice Van Devanter discussed this question as follows:

119 "We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before

"A legislative body cannot legislate wisely or effectively

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional pro-

visions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."

In the cited case the Supreme Court observed that it is not necessary for the Resolution directing the investigation to avow in express terms that it is intended to be in aid of legislation. If it appears that the matter to be investigated is relevant or material to some subject over which the Congress may legislate, or in respect to which it may appropriate funds, the power to conduct the investigation exists.

In the case of *In re Chapman,* 166 U. S. 661, 670, Mr. Chief Justice Fuller, observed that it was not necessary that the Resolution authorizing the investigation should declare in advance what the Congress "meditated doing when the investigation was concluded."

In *Barry v. United States ex rel Cunningham,* 279 U. S. 597, 619, Mr. Justice Sutherland stated:

120 "The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority."

In *United States v. Norris,* 300 U. S. 564, 573, Mr. Justice Roberts stated:

"That it is within the constitutional province of Congress to institute investigations and to compel evidence with a view to possible exercise of its legislative function . . . is settled."

In a recent case in this jurisdiction, *Townsend v. United States,* 68 App. D. C. 223, 226, Mr. Justice Justin Miller in commenting on an objection that the investigating Committee involved in that case never recommended any remedial legislation, made the following observation:

"This is clearly beside the point. The act for which appellant was indicted occurred before the hearings of the committee were concluded. Its power to conduct a hearing for legislative purposes is not to be measured by recommendations for legislation or their absence."

That the subject of un-American and subversive activities is within the investigating power of the Congress is obvious. Conceivably, information in this field may aid the Congress in legislating concerning any one of many matters, such as correspondence with foreign governments (U. S. Code, Title 18, sec. 5); seditious conspiracy (*Id.* Sec. 6); prohibition of undermining the morale of the armed forces (*Id.* Sec. 9); suppression of advocacy of overthrow of the Government (*Id.* Sec. 10) the registration of organizations carrying on certain types of propaganda (*Id.* Secs. 14 and 15); qualifications for entering and remaining in Government service;
The authorization of Governmental radio broad-
121 casts to foreign countries; and other innumerable topics. Similarly such information may be helpful in appropriating funds.

The argument is advanced by counsel that the Resolution is invalid because it relates to freedom of speech, in respect to which the Congress may not legislate. This contention is without merit. Freedom of speech is, indeed, one of the fundamental rights of every person in a democracy. It is guaranteed and safeguarded by the First Amendment to the Constitution of the United States and is one of the basic rights of every inhabitant of the United States. No one who has any conception of the meaning of democracy would tolerate any encroachment or inroad on freedom of speech. It is not to be lightly assumed, however, that the Congress will enact legislation repugnant to the Constitution. A presumption of validity attaches to every Act of Congress. The burden of proof is on the person attacking its constitutionality. *A fortiori,* the courts may not presume in advance that the Congress will transgress the Constitution. The courts are not the sole guardians of the Constitution. That duty is shared with the other branches of Government, who are under an equal obligation to observe the limitations of the fundamental instrument. It is not to be presumed that the Congress will ignore its duty. Moreover, the right of freedom of speech is, in it-

self, a qualified right. The First Amendment does not, for example, preclude the Congress from excluding obscene matter from the mails or from the channels of interstate commerce. It does not guarantee to any one the right to incite others to commit a crime. It does not preclude the Congress from punishing persons who advocate the overthrow of Government by force. It does not bar the
122 Congress from limiting certain activities of Government employees, although similar activities are within the rights of all other citizens. Other limitations on the right of freedom of speech will occur to every thinking person. In any event, information to be obtained by this investigation is not limited in its use to legislation in respect to freedom of speech, but as heretofore indicated, may be utilized in respect to legislation on other subjects.

It is urged further that the Resolution is unconstitutional because it is too indefinite, in that the words "un-American" and "subversive" are not defined and do not have a precise and well-established meaning. In support of this contention, reliance is placed on the general proposition of law that a penal statute which does not provide an ascertainable standard of guilt is violative of the due process clause of the Fifth Amendment and is, therefore, invalid. This doctrine has been established by a line of cases of which *United States v. Cohen Grocery Co.*, 255 U. S. 81, is typical. These decisions, however, are directed solely to penal statutes and relate to the well-known rule of law that no one sholud be punished criminally for an act which at the time he committed it he was unable to ascertain would be considered a crime. This rule, however, does not apply to statutes of other types.

There is nothing to the contrary in the case of *Kraus & Bros. v. United States*, 327 U. S. 614, 620. That case involved the validity of a regulation issued by the Administrator of the Office of Price Administration, to which a criminal sanction was attached. The court held that the

regulation was subject to the same test as a penal statute. This line of reasoning, however, does not apply to the Resolution involved in the instant case.

123 No doubt many an Act of Congress may be found in which general terminology is intentionally or unintentionally employed. This is true of the present Resolution. The Committee is directed to investigate un-American and subversive activities. The exact scope of an investigation cannot always be charted and bounded in advance with the precision of a survey. In conducting a research, an inquiry, or an investigation, some discretion must be left to those to whom the task is entrusted, if the objective is to be attained. If we analyze the words "un-American" and "subversive" as used in the Resolution, there are some activities which everyone will agree are un-American and subversive, and there are others which everyone will place in the opposite group. Between the two extremes, no doubt, there will be some gradations in respect to which persons may well differ. There may well be differences of opinion as to the exact application or meaning of these terms, or as to whether some particular activity falls in one class or the other. This circumstance does not deprive the Congress of the power to investigate un-American and subversive activities, and for the purposes of carrying out its duties to vest in the investigating Committee the discretion to make a preliminary determination as to what activities are comprised within these two terms.

It is argued, however, that a person who is directed to appear or produce documents before the Committee may be at sea in endeavoring to determine whether the Committee is acting within its jurisdiction. It must be borne in mind, however, that the statute (U. S. Code, Title 2, Sec. 192) which punishes failure to comply with a sub-

124 poena or to answer questions, is definite and makes a willful default a misdemeanor. A person who declines to comply with a direction of the Committee on the basis of a claim that the Resolution creating it is invalid,

r that the Committee is exceeding its jurisdiction, acts at is peril. The provisions of an investigating Resolution re not drawn primarily for the benefit of a witness, but re framed for the guidance of the Committee. There are nany situations in which a person assumes a risk in deter-nining whether what he intends to do constitutes a crime. This is true, for example, in respect to violations of the nti-trust laws, because what constitutes an illegal re-straint of trade is frequently a debatable matter.

In *Nash v. United States*, 229 U. S. 373, 377, Mr. Justice Holmes aptly remarked:

". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here: he may incur the penalty of death."

In the light of the foregoing considerations, it is the conclusion of this Court that the House Resolution creating the Committee on Un-American Activities is valid.

It is further urged that the subpoenas as set forth in the indictments, are too broad and are, therefore, violative of the Fourth Amendment. Whether a subpoena is too broad cannot always be determined from the terms of the document, but is a mixed question of law and fact. Consequently, the question should not be determined on a motion to dismiss the indictment for insufficiency. It
125 may be observed that each of the subpoenas is limited to documents relating to a specific topic, or is restricted to specified periods, or both. Somewhat similar subpoenas were held valid in *Brown v. United States*, 276 U. S. 134, 138; and *Wheeler v. United States*, 226 U. S. 478, 483. Moreover, there may conceivably be a question as to whether under the circumstances of this case, the defendants are entitled to assert the privilege guaranteed by the Fourth Amendment, *United States v. White*, 322 U. S. 694, 704. These matters can be determined only at the trial on the facts.

Finally, in the case of *United States v. Edward K. Barsky et al*, it is urged that the first, or conspiracy count, of the indictment is insufficient in that it charges the defendants with a conspiracy to defraud the Government without, however, averring that the conspiracy was to be effectuated by deceit, craft, or trickery, or by means that are dishonest. Reliance is placed on *Hammerschmidt v. United States*, 265 U. S. 182, 188, in support of this objection. The first count of the indictment further charges, however, that the defendants conspired to commit an offense against the United States by violating U. S. Code, Title 2, Sec. 192. Since the allegation last mentioned sets forth a conspiracy that is subject to criminal prosecution, the first count of the indictment is sufficient. Consequently, it is not necessary to determine whether the additional allegations, that are assailed by the defendants, are sufficient if they stood alone.

Motion to dismiss indictments denied. Alternative motions for bills of particulars are also denied.

ALEXANDER HOLTZOFF
Associate Justice

May 20, 1947.

126 DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

THURSDAY, APRIL 8, 1948

The Court resumes its session pursuant to adjournment: Hon. Richmond B. Keech, presiding.

United States v. Helen R. Bryan
Criminal No. 365-47
Charged with Vio. Sec. 192, Title 2, U. S. Code

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited in this case yesterday; whereupon the said jury upon their oath say that the defendant is guilty in manner and form as charged in the indictment; and thereupon the defendant motion

for a new trial and judgment of acquittal, coming on to be heard, after argument by the counsel, is submitted to the Court; whereupon the defendant is permitted to remain on bond pending sentence; and thereupon the case is referred to the Probation Officer of the Court.

127 DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

WEDNESDAY, APRIL 28, 1948

The Court resumes its session pursuant to adjournment: Hon. Richmond B. Keech, presiding.

• • • •

United States vs. Helen R. Bryan
Criminal No. 365-47
Charged with Vio. Sec. 192, Title 2, U. S. Code

Come as well the Attorney of the United States, as the defendant in proper person, according to her recognizance; and by her attorneys, Messrs. O. John Rogge, Benedict Wolf and Robert H. Goldman; and thereupon the defendant's motion for judgment of acquittal or new trial, coming on to be heard, after argument by Counsel, is by the Court denied and thereupon it is demanded of the defendant what further she has to say why the sentence of the law should not be pronounced against her and she says nothing except as she has already said; whereupon it is considered by the Court that, for her said offense, the said defendant be committed to the custody of the Attorney General or her authorized representative for imprisonment for a period of Three (3) months and to pay a fine of Five Hundred ($500.00) Dollars; and thereupon the Court fixed the amount of bond at Five Hundred ($500.00) Dollars pending appeal.

B United States Court of Appeals for the District of Columbia

Filed Apr 29 1948 Joseph W. Stewart, Clerk

FORM OF CLERK'S STATEMENT OF DOCKET ENTRIES TO BE FORWARDED UNDER RULE IV

(To accompany duplicate notice of appeal to the United States Circuit Court of Appeals)

District Court of the United States for the District of Columbia

United States vs. Helen R. Bryan

Criminal No. 365-47

1. Indictment for Vio. Sec. 192, Title 2, U. S. Code Filed March 31, 1947
2. Arraignment April 7, 1948
3. Plea to indictment Plea Not Guilty April 7 1948
4. Motion to withdraw plea of guilty denied
5. Trial by jury, April 7, 1948
6. Verdict or finding of guilt Guilty as indicated April 8, 1948
7. Judgment—(with terms of sentence) Three (3) months and to pay a fine of Five Hundred Dollars ($500.00) entered April 28, 1948 (Keech, J.)
8. Notice of appeal filed April 28, 1948

Date April 29, 1948

Attest Harry M. Hull, Clerk.
By Helen M. McIntosh
Deputy Clerk

N. B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in rules VII, VIII, and IX.

• • • •

128 *Notice of Appeal*

Name and address of appellant
Helen R. Bryan, 58 Bank Street, New York, N. Y.

Name and address of appellant's attorneys
O. John Rogge, Esq., 401 Broadway, New York, N. Y.
and
1700 Eye Street, N. W., Washington, D. C.
NA 6471
Wolf, Popper, Ross & Wolf
160 Broadway, New York 7, N. Y.
and
902 20th Street, N. W.
Washington 6, D. C.
RE 8165

Offense
Violation of Title 2 U. S. C., Section 192

Concise statement of judgment or order, giving date, and any sentence
Verdict of guilty as charged—April 8, 1948,
$500.00 fine and sentence of 3 months
date, April 28, 1948

Name of institution where now confined, if not on bail
Appellant on bail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia from the above-stated judgment.

Helen R. Bryan
Helen R. Bryan
O. John Rogge
O. John Rogge
By: Benedict Wolf
Wolf, Popper, Ross & Wolf

April 28, 1948

• • • •

3 *Proceedings*

THE DEPUTY CLERK OF COURT: United States vs. Helen R. Bryan.

MR. ROGGE: May it please the Court, I am expecting my client momentarily. She is completing a telephone call

to New York. I would like to state to Your Honor what it is, and I have mentioned to her—

THE COURT: Would you like to come to the bench?

MR. ROGGE: Yes, sir.

(Thereupon counsel approached the Court's bench and the following occurred:)

MR. ROGGE: I have mentioned to her that from a factual standpoint I do not think there would be any disagreement between the Government and myself and, under the circumstances, I do not feel warranted in putting the Government to the expense of a jury trial and, for my part, I was willing to stipulate, for instance, that a certain document which Mr. Murray could introduce in evidence if he wants to, was served on her, that the Government contends is a subpoena; I don't, but Your Honor has ruled it is.

That on a particular day she appeared before the House Committee, and that the secretary, if called, would testify to certain things set forth in the record.

That we would admit it is under Section 634 of Title 28.

That we would stipulate that Mr. Adamson, if
4 called, would testify that she appeared but did not produce the books and records, and that the testimony of the Barsky case would be admissible here with the same objections, subject to the same objections we offered with reference to the conduct of the House Committee, and anything of a nature Mr. Murray would be willing to stipulate to.

I have assured her that is not a plea of guilty; she has not been arraigned, and since there is no contest on the facts between us we will be happy to stipulate the facts suggested to Mr. Murray, and we would submit it to you, and she is telephoning New York about the situation.

THE COURT: I think it is a very sensible suggestion.

MR. ROGGE: I think it is, and if Your Honor should find her guilty I should then go ahead and introduce something of her background, which I think is very good; the

Government has called her a scapegoat, and she has testi fied for the Government three different times, one tim when Your Honor offered her the privilege, and that ther should be no more than a fine from which she will appea and if that meets with Your Honor's approval I think w can dispose of it in fifteen minutes after she gets here.

This is a very summary statement, and the other point would be the constitutionality of the House Committee.

THE COURT: Oh, certainly.

MR. MURRAY: We will go into that as we go alon anyway.

THE COURT: I have no idea that I would trea her differently than any of the other defendants.

MR. ROGGE: That is the suggestion I would lik to make to Your Honor.

THE COURT: I want to say to you I make no prom ises.

MR. ROGGE: Oh, surely, but the reason I want to d it this way is that I have no—I am making this suggestio as much for myself as well as anyone else, namely, haven't any factual dispute with the Government.

THE COURT: You have a duty to the Court as well a your client, Mr. Rogge. You have first to protect you client to the extent the law gives you the right and I, fo one, want you to do that; on the other hand I do not thin there is any reason in the world of doing it the other wa if you can preserve your rights, and I think you can.

MR. MURRAY: She is here now.

MR. ROGGE: Will Your Honor indulge me for abou five minutes?

THE COURT: Surely. Do you want to take her ou side to talk to her?

MR. ROGGE: I think that would be better.

THE COURT: All right, sir.

(Thereupon counsel retired to the trial table. Counse for the defendant and the defendant retired from the cour room, and upon returning to the courtroom the followin occurred:)

6 MR. ROGGE: My statement to Your Honor as—

THE COURT: Maybe you had better come to the bench.

(Thereupon counsel approached the Court's bench and the following occurred:)

THE COURT: Until we definitely know what we are going to do.

MR. ROGGE: She insists on a jury trial. However, I want to stipulate as many factual situations as possible. Certainly that goes for pertinency, and also goes, if Mr. Murray is agreeable, as to the proof we made as to the conduct of the House Committee.

I am also willing to stipulate that if the reporter were called he would testify that certain proceedings took place on April 4, so he doesn't have to call the reporter.

He has Mr. Adamson. I suppose he might as well put him on the stand and meet that.

THE COURT: We have waited a day pretty near for your convenience, and it is now after two o'clock, and we are not going to kill anybody who isn't satisfied but if there is anything you can do without prejudicing your client I am asking you to do it.

MR. ROGGE: I am doing it, and I am asking Mr. Murray if there are any additional facts he wants to stipulate.

MR. MURRAY: I will need to prove that the defendant was summoned.

7 MR. ROGGE: I will agree that a certain document, and you may have it marked, was served on the defendant. We may say it is not a subpoena. You say it is a subpoena.

MR. MURRAY: And do you stipulate that the person serving it was, that is, that McDavitt did serve it?

MR. ROGGE: Yes, that was as you had it before, except we brought out on cross examination that he was neither a sergeant-at-arms nor a special messenger of the sergeant-at-arms.

MR. MURRAY: That is correct. I will stipulate that he was neither one.

THE COURT: Let's see, we have pertinency, and by pertinency we will make use of these exhibits by both sides, with objections to either side.

MR. ROGGE: Right.

MR. MURRAY: And the summons, that she was served.

THE COURT: Yes, she was served, in the same manner as in the other case.

MR. MURRAY: Yes.

THE COURT: And you say not by a sergeant-at-arms?

MR. ROGGE: Right.

THE COURT: And you are contending that is not sufficient?

MR. ROGGE: Yes.

THE COURT: Now we have the pertinency; you did say something else.

8 MR. ROGGE: Yes, I agree that the witness, if he were called, would testify that the document represents a correct statement of what took place on April 4 before the House Committee on Un-American Activities.

THE COURT: Now, you are referring to her testimony. I don't know if you want to use this.

MR. MURRAY: I shall call Mr. Adamson to testify that she appeared and admitted she was the custodian, but did not produce the records. And then, of course, I shall consent to the use of any of the portions of her testimony that the defense think ought to be received in explanation.

THE COURT: I have read this record. She has stated in here that she is doing it on her own responsibility.

MR. MURRAY: That is right.

THE COURT: In more than one place she says she is the custodian and takes the full responsibility for it. I do not know what issue of fact you are going to the jury on, and that is not my concern, I suppose.

MR. ROGGE: I have already stated to Your Honor that there are no factual differences between the Government and myself. Your Honor knows if there is a factual dispute indicated by—

THE COURT: I would want you to, but I am unable to see it.

MR. ROGGE: That is the reason I call it to Your Honor's attention for your suggestion.

THE COURT: All right. Let us proceed as far as we can.

MR. ROGGE: The question is does she have a right to a jury trial, and she is insisting on it, and here I am. It places me in an embarrassing situation. All I can do is to disclose it to the Court.

THE COURT: That is correct.

(Thereupon counsel returned to the trial table and the following proceedings were had in open court:)

MR. MURRAY: If Your Honor please, the defendant has not been arraigned.

MR. ROGGE: Waive the reading of the indictment.

THE DEPUTY CLERK OF COURT: Helen R. Bryan, in Criminal Case No. 365-47, in which you are charged with violation of Section 192, Title 12 of the United States Code, how do you wish to plead?

THE DEFENDANT: Not guilty.

(Thereupon the jury panel was sworn on voir dire.)

* * * *

(Thereupon counsel approached the Court's bench and, out of the hearing of the prospective jury, the following occurred:

MR. ROGGE: I am in an embarrassing situation in this case. I want to represent this woman—

THE COURT: Do you want me to ask all these questions on the voir dire?

MR. ROGGE: We submitted two lists, and I think the best thing is to follow the second list and let it go. There was only one that was stricken out.

THE COURT: And we changed these.
MR. ROGGE: Yes.
THE COURT: Do you know any others?
MR. MURRAY: No, Your Honor.
MR. ROGGE: This was on the second list.

• • • •

16 THE COURT: Is any member of the panel an employee of the Government?
(A number of jurors indicated in the affirmative.)
THE COURT: I will start with juror number 1. Give your name, please.
JUROR HOFFMAN: Gotthard A. Hoffman.
THE COURT: Where are you employed?
JUROR HOFFMAN: Navy Yard, Naval Gun Factory.
THE COURT: The next juror in the box, number 6.
17 JUROR MacDONALD: General Accounting Office.
THE COURT: Number 9.
JUROR MILLER: William E. Miller, messenger, A. A. F.
THE COURT: Number 10.
JUROR MORRIS: Blanche E. Morris, Bureau of Engraving, printer's assistant.
THE COURT: That is all in the box as Government employees.
MR. ROGGE: May we approach the bench?
THE COURT: Yes.
(Thereupon counsel approached the Court's bench and, out of the hearing of the prospective jurors, the following occurred:)
MR. ROGGE: For the purpose of the record, and on the basis of the argument I made in the prior proceeding, I make a motion in this case that all Government employees be excluded from the jury panel. I want to save that point in the record.

MR. MURRAY: This other trial, of course, is Ernestina Fleischmann, 368-47.

MR. ROGGE: We argued it at length before Your Honor.

THE COURT: That was identifying the case.

(Thereupon counsel returned to the trial table and, the following proceedings were had in open court:)

THE COURT: Starting over here.

JUROR HANCOCK: Benjamin S. Hancock, truck driver.

JUROR WALLIN: William L. Wallin, Department of Labor.

JUROR ENDRES: Joseph E. Endres, General Accounting Office.

THE COURT: Anyone else in the first row?

JUROR GRASSI: Orlando R. Grassi, City Post Office.

THE COURT: Anyone else?

JUROR STARK: Robert J. Stark, United States Naval Research Laboratory.

THE COURT: Anyone else?

Is any member of the panel an applicant for a position with the Government?

JUROR WILKINS: Norma L. Wilkins, Bureau of Standards.

THE COURT: Is any member of the immediate family of any member of this panel a Government employee, or an applicant for a Government position? Mr. Wallin?

JUROR WALLIN: My wife is employed at the War Department.

THE COURT: On the end?

JUROR HALFERTY: Dale Halferty; my brother is employed at the District Treasury.

THE COURT: Your name?

JUROR CARL: Frederick Carl; I have a brother in the Pentagon Building.

* * * *

MR. MURRAY: The Government is content.

MR. ROGGE: We have used our challenges.

THE DEPUTY CLERK OF COURT: The jurors will rise, place their right hands on the Bible and be sworn. The defendant will rise and face the jury

(Thereupon the following named jurors were sworn to try the case:)

1. Grace M. Sorrell
2. Gustav A. Katz
3. Samuel R. Kelly
4. Alice R. Lattisaw
5. Eleanor Loeb
6. Robert J. Stark
7. Sidney W. Marks
8. Carlon Mickey
9. William E. Miller
10. Solomon Stichman
11. Margaret L. Newman
12. Somerset D. Roby, Jr.

• • • •

MR. MURRAY: I offer in evidence House Resolution No. 5 as Government Exhibit No. 1.

No. 2, the Journal of the House showing the personnel of the committee.

No. 3, the subpoena.

And may I refer to these briefly?

THE COURT: I understand that there is no objection?

MR. ROGGE: As to the third document, Judge, I raise the objection as I did before. I do not raise it as to the nature of the proof, but I do raise the objection that it is not a subpoena. I raise no objection to the form of the evidence.

THE COURT: Subject to that it may be received in evidence. All exhibits are received in evidence.

(Thereupon House Resolution No. 5 was by the Court received in evidence as Government's Exhibit No. 1.)

(Journal of the House showing personnel of committee was by the Court received in evidence as Government's Exhibit No. 2.)

(The subpoena referred to was by the Court received in evidence as Government's Exhibit No. 3.)

MR. MURRAY: Members of the jury, Government Exhibit No. 1, which has been received in evidence is a resolution of the House of Representatives dated January 3, 1945, which authorizes the creation by the House of a Committee on Un-American Activities to consist of nine members, and authorizing that committee to make certain investigations. The nature of it need not be given in detail here because it will not be a fact at issue before you, but this resolution issued on January 3, 1945, did authorize the creation of that committee, and did authorize that committee to make a particular kind of investigation.

Government Exhibit No. 2 has been received in evidence, and that is a certified transcript from the Journal of the House of Representatives containing certain portions of the Record of the House, and indicating who are the personnel, who are the members of the House appointed to be the nine members of that House committee authorized by the resolution. I have already read the complete names of the members to you, and I will not repeat except to say that the chairman was John S. Wood of Georgia.

Government Exhibit No. 3 has been received in evidence, and I am authorized to say that it is stipulated and agreed between counsel for the Government and counsel for the defendant, with the approval of the Court, that this paper I have here, a photostatic copy of it, is a correct copy of a paper which was issued by authority of the chaiman of the House Committee on Un-American Activities on March 29, 1946, and that paper was placed in the hands of George V. McDavitt, an investigator at that time of the House Committee on Un-American Activities, and was by him served upon Miss Helen R. Bryan, the defendant in this case, in New York City at 11:37 a. m. on March 29, 1946, at the offices of the Joint Anti-Fascist Refugee Committee at 192 Lexington Avenue, New York City, New York; that is that this original paper was handed to her for her to read, and a copy was left with her at that time.

I shall now read the original:

"By authority of the House of Representatives of the Congress of the United States of America.

"To the Sergeant at Arms, or his special messenger:" and I may interrupt at that point to put into the record the stipulation that Mr. McDavitt did answer the description.

THE COURT: It is understood.

MR. MURRAY: I shall resume the reading:

"To the Sergeant at Arms, or his special messenger:

"You are hereby commanded to summon the Joint Anti-Fascist Refugee Committee, 192 Lexington Avenue, New York City, a voluntary organization, to be and appear before the Un-American Activities Committee, of the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, and to bring with you all books, ledgers, records, and papers
34 relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries. The said books, papers, and records demanded herein are for the period from January 1, 1945, up to and including the date of this subpoena, in their chamber in the City of Washington, on April 4, 1946, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

"Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this 29th day of March, 1946."

Signed "John S. Wood, Chairman."

Attested by "John W. Carrington," who was the clerk of the committee.

On the back is what is called the return of the one serving the paper, that is, he was to report on his service, and this shows that it was served on Miss Helen R. Bryan at 11:37 a. m. on March 29, 1946, at the offices of the Joint Anti-Fascist Refugee Committee, located at 192 Lexington Avenue, New York City, New York, by George V.
35 McDavitt, investigator of the House Committee on Un-American Activities.

Mr. Adamson, will you take the stand, please?

Thereupon—

Ernie Adamson

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Adamson, your full name, please? A Ernie Adamson.

Q And you are an attorney at law? A Yes.

Q At this time practicing and residing in Pittsburgh, Pennsylvania? A Yes, sir.

Q Were you in April, 1946, counsel for the Committee on Un-American Activities of the House of Representatives? A Yes, sir.

Q And the chairman at that time was who? A John S. Wood of Georgia.

Q And the clerk? A John W. Carrington.

Q Are you, and were you then, familiar with the summoning of Miss Helen R. Bryan here to appear be-
36 fore the committee on April 4, 1946? A Yes, I remember Miss Bryan.

Q What part in the proceedings and hearing before that Committee on Un-American Activities on April 4, 1946, did you take? A Well, I conducted the examination of the witnesses called when they appeared.

Q I beg your pardon? A When they appeared I conducted the examination.

Q Did you question Miss Bryan? A Yes, sir.

Q She did appear before the committee on that day? A Yes.

Q And did she state that it was in response to the summons that was issued and directed to the Joint Anti-Fascist Refugee Committee? A That is true. I think she brought in a copy of the subpoena that had been left with her, and I believe she distributed a statement of some kind she had prepared.

Q All right, I will just ask you a question: Did Miss Bryan admit herself to be at that time the custodian of the records called for?

MR. ROGGE: I object to the question, if the Court please. If he wishes to state what was said, that is all right.

THE COURT: Very well, reframe the question

MR. MURRAY: In view of that objection, Your 37 Honor, I think I shall make use of portions of this exhibit.

THE COURT: Very well. I understand there is no objection.

MR. ROGGE: We have stipulated as to the hearing, but we have objected to the admissibility under Section 34.

THE COURT: You preserved that to the exhibit and offer.

MR. ROGGE: There is no objection to the form of the evidence.

THE COURT: Very well.

MR. MURRAY: Members of the jury, I shall now read to you from portions of the proceedings before this Committee on Un-American Activities at Washington, D. C., on April 4, 1946, before which this defendant, Miss Helen R. Bryan, appeared as a witness. I am permitted to say to you that it has been stipulated and agreed between counsel, with the approval of the Court, that what I am reading from, and perhaps I should designate it, if I may, in this manner, is a printed document consisting of a total

of 105 pages, which is a printed transcript of the proceedings before the committee on April 4, 1946, which became an appendix to a part of a committee report of the House of Representatives of April 16, 1946, known as Report No. 1936 of the Seventy-Ninth Congress, Second Session.

It has been agreed, and is agreed to be the fact that if the reporter who took these proceedings were to appear before you he would testify that he did take these
38 proceedings by the use of a stenotype machine, and did cause his report of the notes to be transcribed by reading them into dictaphone records, and thereafter by checking these with his notes, and that a typewritten transcript of that was made, and that they were to the best of his knowledge an accurate transcript of the proceedings which he had taken, and that transcript later was sent to the printer and became the printed document which I am reading from at this time.

May I now proceed to read from it?

MR. ROGGE: You have the additional part?

THE COURT: Yes, about the notes that were destroyed at a certain time?

MR. ROGGE: I wasn't going to refer to that. I assumed that was a part of the stipulation. All I was going to suggest, if counsel is going to read part of it he should read all of it.

THE COURT: I think he may read such part as he may see fit, and you may supplement it with such parts as you see fit.

MR. MURRAY: Your Honor, the point I make in reading it—you mean that statement at the end?

MR. ROGGE: No.

MR. MURRAY: Only the questions and answers?

MR. ROGGE: Yes.

MR. MURRAY: I will read all of it.

Another point I should have mentioned in con-
39 nection with the printed transcript was that if that reporter, stenotype reporter, his name is Howard

B. Smith, a reporter who has been reporting such proceedings for more than 20 years at the Capitol, if he were called he would testify that the stenotype notes he made are no longer in existence, having been destroyed by him, along with other notes, in April or May of 1947, which was a month or two months after the indictment in this case was returned to the Court.

I am reading beginning at page 96:

"Testimony of Miss Helen R. Bryan, Executive Secretary, Joint Anti-Fascist Refugee Committee, New York City.

"(The witness was duly sworn by the chairman.)

"Mr. Adamson. Will you give your name and address to the reporter, Miss Bryan?

"Miss Bryan. Helen R. Bryan, 58 Bank Street, New York City.

"Mr. Adamson. And what is your official connection with the Joint Anti-Fascist Refugee Committee?

"Miss Bryan. I am executive secretary.

"Mr. Adamson. What is the office address?

"Miss Bryan. 192 Lexington Avenue.

"Mr. Adamson. And you are employed there, are you?

"Miss Bryan. Yes, I am executive secretary.

"Mr. Mundt. Is that a paid position?

"Miss Bryan. Yes, it is.

40 "The Chairman. By whom are you employed?

"Miss Bryan. By the executive board.

"The Chairman. How long have you been so employed?

"Miss Bryan. Three years ago this March, last March.

"The Chairman. The executive board fixes your compensation?

"Miss Bryan. Yes.

"The Chairman. And fixes your tenure of office?

"Miss Bryan. They do.

"The Chairman. They have authority to terminate it at will?

"Miss Bryan. Well, I suppose I could be fired.

"The Chairman. That is what I say.

"Miss Bryan. Yes, sir.

"The Chairman. And the authority that could fire you would be the executive board?

"Miss Bryan. Yes, sir.

"Mr. Mundt. Do you have a written employment contract?

"Miss Bryan. No, sir.

"Mr. Mundt. You are hired from month to month on a monthly salary?

"Miss Bryan. Yes.

"The Chairman. When you first went to work for this committee the executive board employed you?

41 "Miss Bryan. Yes.

"The Chairman. And fixed your compensation?

"Miss Bryan. Yes.

"The Chairman. And did they fix a specified term for your employment or not?

"Miss Bryan. That I don't remember.

"Mr. Landis. Were you hired by the year or the month?

"Miss Bryan. I am now hired by the year.

"The Chairman. And that arrangement was made between you and the executive board?

"Miss Bryan. That's right.

"The Chairman. Do you know of any other authority over the activities or policy making of the Joint Anti-Fascist Refugee Committee except the executive board? I mean with reference to fixing its policies and employing its employees, directing their activities?

"Miss Bryan. It is the executive board, yes.

"Mr. Adamson. You are here today in compliance with a subpena which was served upon the committee by this office?

"Miss Bryan. That is correct.

"Mr. Adamson. Have you got the pink copy of your subpena with you?

"Miss Bryan. I didn't know I had to bring it.

42 "Mr. Adamson. You don't have to, but you can mail it in to us.

"The Chairman. Have you got it with you?

"Miss Bryan. No.

"Mr. Adamson: Look at one of these pink copies of subpenas here and tell us if that is the form and substance of the one which was served upon you.

"Miss Bryan (after examining a subpena). Yes, I think it is.

"Mr. Adamson. And this subpena was addressed to the Joint Anti-Fascist Refugee Committee? Is that correct?

"Miss Bryan. Yes.

"Mr. Adamson. And was served upon you because you are the executive secretary and in charge of the office?

"Miss Bryan. Yes.

"Mr. Adamson. Can you recall when the subpena was served?

"Miss Bryan. Yes, I think so. I think it was Friday morning, between 11 and 1 o'clock.

"Mr. Adamson. Last Friday?

"Miss Bryan. Last Friday morning.

"The Chairman. That will be one week tomorrow?

"Miss Bryan. That is correct.

"Mr. Adamson. Have you produced here today,

43 in compliance with the requirements of the subpena, the books, papers, and records of the Joint Anti-Fascist Refugee Committee?

"Miss Bryan. I am the executive secretary—

"Mr. Adamson (interposing): Now wait just a minute, Miss Bryan. Will you say 'yes' or 'no,' and then we will take up your statement?

"Miss Bryan. No, I would prefer to read my statement. It is very short, Mr. Adamson.

"Mr. Adamson. I don't know that there would be any objection to letting you make the statement.

"The Chairman. First state whether you have got the books.

"Miss Bryan. I prefer this other way.

"The Chairman. But we prefer it that way, and the question has been asked you if you have got them.

"Miss Bryan. But I think I am entitled to read this. It is very short.

"The Chairman. Do you now comply with that subpena? If you say you don't know, then whatever explanation you have got there, you can give it.

"Miss Bryan. I prefer to read this statement. It is very brief.

"The Chairman. After all, you see, you are the witness. You have been asked a question. What is
44 your answer to it? If you want to read your statement, we are willing for you to do it after you answer the question.

"Miss Bryan. Well, as executive secretary of the Joint Anti-Fascist Refugee Committee, as custodian of the books and records, I was advised by my executive board to find out what steps I should take, within my legal rights, to protect the books and records and correspondence of this organization.

"The Chairman. From whom?

"Miss Bryan. I was advised to consult with counsel.

"The Chairman. You were advised to protect them from what?

"Miss Bryan. To protect them from any kind of investigation which would interfere with the relief we are carrying on.

"The Chairman. Particularly this committee of Congress?

"Miss Bryan. Yes.

"The Chairman. When did you get that instruction?

"Miss Bryan. Well, Mr. Wood, I don't remember the exact time.

"The Chairman. Has it been since you were served with the subpena?

"Miss Bryan. Oh, no.

45 "The Chairman. You were served with this before?

"Miss Bryan. That is right.

"Mr. Landis. After you were served with the other subpena?

"Miss Bryan. That's right.

"The Chairman. After you were served the first time?

"Miss Bryan. Yes, sir.

"Mr. Mundt. Before or after your appearance before this committee?

"The Chairman. Just a moment—then you conferred with an attorney by the name of Wolf?

"Miss Bryan. I conferred with counsel.

"The Chairman. Just name him.

"Miss Bryan. Mr. Benedict Wolf.

"The Chairman. Will you identify him. Mr. Benedict Wolf is counsel for the executive board of the Joint Anti-Fascist Refugee Committee?

"Miss Bryan. Mr. Benedict Wolf is the counsel for the Joint Anti-Fascist Refugee Committee.

"The Chairman. He is employed by the executive board and paid by the executive board?

"Miss Bryan. That I cannot tell you.

"The Chairman. You have not paid him.

"Miss Bryan. I have not; no.

"The Chairman. And you conferred with him
46 because you were told that he was the counsel for the Joint Anti-Fascist Refugee Committee?

"Miss Bryan. No you see, my subpena came first.

"The Chairman. I understand, but you knew he was the counsel for the Joint Anti-Fascist Refugee Committee? You stated that.

"Miss Bryan. I was subpenaed as the executive secretary of the Joint Anti-Fascist Refugee Committee.

"The Chairman. But you say you were subpenaed and that the board had a meeting and directed you to take all

legal steps, consult counsel and take all legal steps to protect the books, records, and papers. You are complying with that subpena.

"Miss Bryan. No; I didn't say that.

"The Chairman. You said protect you against investigation, and you had no other—

"Miss Bryan (interposing). No; protect the books and records of our organization.

"The Chairman. From investigation?

"Miss Bryan: No; I said—you asked me what I was protecting from, and I said that the board had advised me to consult with counsel to see what steps could be taken within my legal rights to protect the books and records of our organization.

"The Chairman. From investigating committees?

47 "Miss Bryan. No.

"The Chairman. What I want to know is, Protect them from what?

"Miss Bryan. I am telling you what my board told me.

"The Chairman. What did you want to protect them from?

"Miss Bryan. That is what the board said.

"The Chairman. Now, the board told you that after you had been served with a subpena to produce those books before this committee of Congress; didn't it?

"Miss Bryan. I would have to ask about that, because I am not sure.

"Mr. Landis. That was after you were subpenaed here before?

"Miss Bryan. It was before I was subpenaed; yes.

"Mr. Landis. I mean the last time. It was after your first subpena, wasn't it?

"Miss Bryan. That is what I don't actually remember.

"The Chairman. Why did you remember it a while ago when you said it was?

"Miss Bryan. No; what I don't remember, Mr. Wood—you don't understand—is whether I consulted with coun-

sel before I received the subpena or immediately afterward.

"The Chairman. Well, Miss Bryan, didn't you
48 testify in answer to my question that after you got your first subpena here your board gave you that instruction, and that you then went and talked to counsel? Isn't that what you testified?

"Miss Bryan. You see, I am a little confused about the exact date of when I received the first subpena.

"The Chairman. But I am asking you now if that isn't what you said a while ago.

"Miss Bryan. Would you ask that again?

"The Chairman. Didn't you testify that after you got the first subpena your board then told you to consult with your counsel and to use all legal means?

"Miss Bryan. I would like to consult counsel on that.

"The Chairman. Why?

"Miss Bryan. Because I would like to just get the dates straight. I don't want to say something that is not true.

"The Chairman. Would you be willing to swear to what he says?

"Miss Bryan. Yes.

"The Chairman. You would? You mean you would come back in here and give your oath that the date he gives you is correct? Is that what you mean to tell the committee?

"Miss Bryan. I think he would have it in his records. I don't have any records with me.

49 "The Chairman. And you would come back in here and swear on his records or on his statement when it was? Is that right?

"Miss Bryan. Yes. I am sure he would have it in his records, Mr. Wood.

"The Chairman. I am not asking you that. Are you willing then to come back in here and say that what he tells you is the truth?

"Miss Bryan. If he finds it in his records.

"The Chairman. That that is the truth?

"Miss Bryan. Yes.

"The Chairman. Then the committee would not be very much interested in that sort of testimony.

Was there anybody else seeking these books and records at the time you conferred with him the first time?

"Miss Bryan. Not that I know of.

"The Chairman. Then you understood, of course, that the instructions you had had reference to our efforts to get these books and records?

"Miss Bryan. I understood that.

"The Chairman. And you went and consulted Mr. Wolf?

"Miss Bryan. Correct.

"The Chairman. Then we will get back again to my question. Mr. Wolf is employed not by you but by the executive board of the Joint Anti-Fascist Refugee Committee? That is right, isn't it?

"Miss Bryan. That I don't know.

"The Chairman. He is not employed by you?

"Miss Bryan. No; I am sure of that.

"The Chairman. Why did you consult him?

"Miss Bryan. He was—we were advised that he was a competent lawyer.

"The Chairman. The lawyer for the Joint Anti-Fascist Refugee Committee?

"Miss Bryan. That I didn't know.

"The Chairman. That was the information you had?

"Miss Bryan. No.

"The Chairman. That is just what you just this minute said.

"Miss Bryan. I didn't say he was employed by the Joint Anti-Fascist Refugee Committee.

"The Chairman. You said just now that you understood he was their lawyer.

"Miss Bryan. No; I did not say that, Mr. Wood. I said I was advised to consult with him.

"The Chairman. And you were advised that by the board, the executive board?

"Miss Bryan. No.

"The Chairman. Whom were you advised by?

"Miss Bryan. One or two members of the ex-
51 ecutive board.

"The Chairman. By the members of the executive board?

"Miss Bryan. One or two members.

"Mr. Mundt. Was Dr. Barsky one of those members?

"Miss Bryan. Yes; he was.

"The Chairman. And following that advice you went and conferred with Mr. Wolf?

"Miss Bryan. Yes.

"The Chairman. And you are now carrying out Mr. Wolf's instructions?

"Miss Bryan. No; I am not, Mr. Wood.

"The Chairman. Whose instructions are you carrying out?

"Miss Bryan. Mr. Wood, Mr. Wolf explained to me—

"The Chairman (interposing): I am not asking about his explanation. I am asking at whose direction now are coming down here without these books and records?

"Miss Bryan. My own.

"The Chairman. Your own? You are taking full responsibility?

"Miss Bryan. I am.

"The Chairman. And why did you go to consult him, then?

"Miss Bryan. Because I wanted to know what
52 my legal rights were in such a case.

"The Chairman. After you consulted with him and he told you what, in his opinion, your legal rights were, you made up your mind?

"Miss Bryan. No.

"The Chairman. When did you make up your mind?

"Miss Bryan. He advised with me and pointed out to me—

"The Chairman(interposing). I just asked you when you made up your mind not to bring them?

"Miss Bryan. Before the last appearance.

"The Chairman. And that was after you conferred with him?

"Miss Bryan. Oh, yes.

"The Chairman. If the executive board of the Joint Anti-Fascist Refugee Committee should direct you by majority of that board to make those books, records, and papers available to this committee of Congress, would you do it or wouldn't you?

"Miss Bryan. I don't know, Mr. Wood.

"The Chairman. You don't know?

"Miss Bryan. No.

"The Chairman. Well, don't you know whether you would or whether you would get out as executive secretary?

"Miss Bryan. I don't know.

53 "The Chairman. So you mean now to tell this committee that you are acting arbitrarily, on your own initiative, and that the board could not control your action at all?

"Miss Bryan. No; I didn't say that.

"The Chairman. Can the board do it?

"Miss Bryan. Can the board control me?

"The Chairman. Yes.

"Miss Bryan. I said earlier that—

"The Chairman (interposing). Now, let us get along. Can the board control your actions?

"Miss Bryan. Certainly.

"Mr. Mundt. Do you feel that you have the support of the board in the decision which you say you are making on your own behalf not to give these records and books to the committee?

"Miss Bryan. I don't think that is a pertinent question.

"Mr. Mundt. You don't think it is pertinent to know whether the board is supporting your position or not?

"Miss Bryan. I don't think it is pertinent for me to answer that question.

"Mr. Mundt. Do you know?

"Miss Bryan. I don't think that is a pertinent question.

54 "Mr. Mundt. You decline to answer.

"Miss Bryan. I don't think it is pertinent.

"The Chairman. The question is whatever you think about it. Do you want to answer it or not. You have two alternatives. You can answer "Yes" or "No" or you can say you decline to answer it. Which do you do?

"Miss Bryan. What was the question again?

"The Chairman. Whether or not the board is supporting you in your action not to give us the books and records.

"Miss Bryan. I don't think that is a pertinent question.

"The Chairman. Do you decline to answer it for that reason?

"Miss Bryan. I say I don't think it is a pertinent question.

"The Chairman. I understand you said that half a dozen times. But I want to know whether you decline to answer it.

"Miss Bryan. Well, I just say that I don't think it is a pertinent question.

"The Chairman. You have already said that.

"Miss Bryan. That is all I say.

"Mr. Landis. You don't say "Yes" or "No," then? You decline to answer?

55 "The Chairman. You have the right to decline if you want to.

"Miss Bryan. I would rather leave it at that.

"The Chairman. Then you will not answer it? Is that right?

"Miss Bryan. I have answered in saying I don't think it is a pertinent question.

"The Chairman. I understand that, but that doesn't answer the question.

"Miss Bryan. This gentleman says that it does.

"The Chairman. I don't care what the gentleman says. It is not an answer, and you know it is not an answer.

"Miss Bryan. I think it is an answer.

"The Chairman. And you want to leave it that way?

"Miss Bryan. Yes.

"The Chairman. Are you going to leave it that way?

"Miss Bryan. Yes.

"The Chairman. That is fair enough. That is an answer.

"Mr. Rankin. You decline to produce these books?

"Miss Bryan. After consulting with counsel I came to the conclusion that the subpena was not valid and therefore, although I am very glad to testify about any part of the relief activities of our organization, I cannot comply with your request for the production of
56 the books and records.

"The Chairman. And you haven't got them here, have you?

"Miss Bryan. I said, Mr. Wood, I could not comply with your request.

"The Chairman. I understand that, but you haven't got the books here available to this committee, have you?

"Miss Bryan. No.

"Mr. Rankin. Mr. Chairman, I would like to consult with the committee just a minute. Let the witness step into the next room.

"(The witness withdrew from the committee room.)"

Then there is a statement in the record which I understand is to be omitted, and following that—no, I won't read that either because it does not relate to this case, but the whole proceeding.

BY MR. MURRAY:

Q Were you before the committee during this questioning and answers I have just finished reading, Mr. Adamson? A Yes, sir.

MR. MURRAY: I have no further questions on direct examination.

THE COURT: Suppose you gentlemen come to the bench a minute.

(Thereupon counsel approached the Court's
57 bench, the witness retired from the witness stand and, out of the hearing of the jury, the following occurred:)

THE COURT: I don't know whether Mr. Rogge is going to ask any questions of this witness. Do you want to ask him? I don't want to call him back.

MR. MURRAY: I have no further questions if, as I understand it, we do not have to go into any additional proof of pertinency.

THE COURT: No, but I mean asking this witness from Pittsburgh.

MR. ROGGE: I am going to question him.

MR. MURRAY: As long as it is going in I will ask him on direct examination.

THE COURT: All right.

(Counsel returned to the trial table, the witness resumed the witness stand, and the following proceedings were had in open court:)

BY MR. MURRAY:

Q Mr. Adamson, do you recall how many members of the committee were present during the questioning of Miss Bryan? A Well, as I recall it, she was called towards the end of the day, and I do not think all the members of the committee were present. As I recall it, there were six of the nine present, but I would have to look at the transcript to refresh my recollection.
58 The Chairman was there, and Mr. Mundt was there, and Rankin, Peterson, but as to the others I would want to look at the transcript to refresh my recollection. As a matter of fact, they came and went all day during the hearing.

Q As far as the transcript you refer to, all that shows is the questions and answers, and as far as I know it does not show at any particular time the members there. Of course, in the asking of questions, anybody asking questions would have to be there to do it, but it does not give any list of members at different times? A No, my recollection is that there were six members of the committee present when the committee adjourned that afternoon, and I recall when she handed in her statement she had papers in her hand that some of the members accepted and read the statement after the committee adjourned.

MR. MURRAY: That is all. That is the end of the direct examination.

Cross Examination

BY MR. ROGGE:

Q Now, Mr. Adamson, she didn't hand you any particular statement on that day? A I believe there was a statement, a mimeographed statement given out by somebody, and I think Miss Bryan had papers in her hand from which she took some copies. Now, whether that was the statement, the mimeograph of that transcript, Mr. Rogge, I am not sure.

59 Q As a matter of fact, don't you know that statement was mailed down later? A I think we did get a statement from her by mail, and I think she asked that that statement be substituted or incorporated in the record. I believe at least the one in the record is the one that came by mail.

Q As a matter of fact, doesn't the transcript affirmatively so show? A Yes, I think this is the one that came by mail, and the one you are talking about is the one set out in here. I wouldn't swear to that.

Q On this particular day you had an additional 17 members in the committee? A Yes, there was quite a crowd.

Q And by the time Miss Bryan got on the stand it was quite crowded? A Yes, sir, I think that is right.

Q And your committee adjourned about 6:10? A Yes, I think that is about right.

Q So Miss Bryan must have gone on there only about 5 o'clock? A Well, between 4:30 and 5, or after 4 o'clock.

Q Wouldn't it be fair to say after 4:30? A Well, it was at least—

Q (Interposing) I am trying to get your opin-
60 ion. A Well, it was at least after 4.

Q Is it true that at that late hour there were still six members of the committee present? A Yes, there was a great deal of interest. They came and went from time to time, and we also had a quorum of the committee.

Q As a matter of fact, Congress was in session that day? A Yes, sir, that is true. And I believe the chairman spoke to the Speaker to have the meeting continue in the afternoon while the House was in session.

Q And the committee members went in and out? A Yes.

Q So that you do not know who was there at any particular time? A With the exception of the chairman I wouldn't attempt to say at any particular moment exactly which members of the committee were present.

Q Who was there when Miss Bryan was sworn some time after 4 o'clock in the afternoon? A Well, I have looked at the transcript but, I would say of course that the chairman was there, and the names of the gentlemen who appear in the transcript were certainly there.

Q In other words, do you want to refresh your recol-
lection by looking at this document, is that right? A
61 I have looked at it once already.

A As a matter of fact, you have looked at it today? A No.

Q This week? A No.

Q You looked at it last week? A I may have looked

at it last week in connection with another trial. Well, the chairman, Mr. Landis—

THE COURT: I don't think you need to read this record to reflect those who were there.

BY MR. ROGGE:

Q You said that there were six there. Do you recall any others who were there? A I don't know. I think Peterson was there, and I think Mr. Rankin came and went out a couple of times, and I am not sure whether Mr. Murdock stayed the whole time, or not.

Q As a matter of fact, don't you know he wasn't there when she was being questioned? A I don't recall him taking any part in her examination.

Q As a matter of fact, don't you know he was not there? A No, I wouldn't say he wasn't there at any time.

Q I am not talking about any time. I am talking about the time after 4 o'clock in the afternoon when Miss
62 Bryan was present. A No, I have no such recollection.

Q Wouldn't the same thing be true of Mr. Peterson? A No. My recollection is that Mr. Peterson came in and went out.

Q What time were they there? A I couldn't pick out any particular time on them.

Q The only thing you can tell us definitely are the four people who questioned her, and you can't say that they were there all the time, can you? A No, I can't say that each of them were there when her examination was concluded. I know there were about six when the committee adjourned, but whether the six included the members who interrogated Miss Bryan, except the chairman, I wouldn't care to say.

Q I don't get any definite idea of more than four being there except you say six, but haven't named them. A No; I think that there were six there right straight through.

Q But you haven't any names of those who were there? A No, I would have to refresh my recollection.

Q Now, on this same day you recall that there were a total of 17 other persons there, don't you? A Well, I don't know whether there were 10 or 17, Mr. Rogge, but there was quite a number, I recall.

Q And those other persons who were there were
63 the members of the executive board of the Joint Anti-Fascist Refugee Committee? A I believe they so testified.

Q All 17 of them? A Miss Bryan didn't say she was a member.

Q I am talking about the 17 in addition to her, and you can add them up if you want to. A I will take your word for it. If you say there were 17 I will adopt your figures.

Q All right. Do you know those other 17, talking about those in addition to Miss Bryan, were members of the executive board of the Joint Anti-Fascist Refugee Committee? A They so testified.

MR. ROGGE: That is all.

THE COURT: Any further questions?

MR. MURRAY: I have nothing further.

THE COURT: Is the witness excused, gentlemen?

MR. MURRAY: Yes, Your Honor, we have no further need for him.

MR. ROGGE: That is agreeable.

(Witness excused.)

MR. MURRAY: Your Honor, with the understanding that the matter as to pertinency is not in question under the stipulation stated, the Government will rest.

THE COURT: There is no question about the
64 pertinency matter?

MR. ROGGE: That is correct. That has been stipulated.

THE COURT: All right.

MR. ROGGE: I shall wish to make a motion.

THE COURT: Come to the bench.

(Thereupon counsel approached the Court's bench and, out of the hearing of the jury, the following occurred:)

MR. ROGGE: I would like to finish this in the morning.

THE COURT: Let me ask you this: Is Miss Bryan going to take the stand?

MR. ROGGE: I doubt it. I haven't asked her, but I don't think she will.

THE COURT: The reason I asked about her, I was thinking about the jury. I don't think there is any use holding this jury up tonight.

MR. ROGGE: As a matter of fact, if I have a chance I would like to argue this motion in the morning. I will be very brief.

THE COURT: Let us argue the motion and have that out of the way, and I will excuse the jury now.

(Counsel returned to the trial table and the following proceedings were had in open court:)

THE COURT: Ladies and gentlemen of the jury, the Court is going to recess at this point so far as you are concerned, and you will return tomorrow at 10
65 o'clock. During the adjournment the Court wants to admonish you that you are to talk to no one about this case, and you are not to permit anyone to talk to you about this case, and you are not to talk among yourselves as jurors at this time, and similarly you are to ignore, if anything appears in the newswapers or on the radio, anything about this case.

Is there any further admonition you gentlemen care to suggest?

MR. ROGGE: Nothing further, Your Honor.

THE COURT: There being nothing further, you are now excused to return to this courtroom tomorrow morning at 10 o'clock.

(Thereupon the jury retired from the courtroom after which the following occurred:)

MR. ROGGE: If Your Honor please, in arguing the motion for an acquittal, I want to urge again the various points which were urged upon a motion to dismiss which has previously been relied upon.

I want to urge next the points that arose during the course of the trial, one of them that the document which was served upon Miss Bryan was not a subpoena.

Next, that the testimony given before the House Committee on Un-American Activities was improperly admitted in violation of Section 634 of Title 28.

And I also want to urge upon Your Honor that the
66 defendant was given immunity as a result of what I contend was Your Honor's erroneous ruling requiring Miss Bryan to answer certain questions in the trial of the Fleischman case.

Now, I will say to Your Honor on that that I haven't had a chance to look up the law, but I do remember on one occasion when I was doing some grand jury investigation in the State of Louisiana, I found the District Attorney there had a waiver of immunity and I said, "Where is the immunity statute?" and I didn't find it, but I did find authorities to the effect that if a witness was asked to answer, and compelled under compulsion to answer, that gave, in effect, legal immunity.

Now, certainly Miss Bryan, when she was before you in the Fleischman case, would have continued to refuse to answer at her peril because it was within Your Honor's power, or at least the witness would have felt that, that you had it in your power to commit her for contempt, so she was under compulsion to answer that question after she had claimed her privilege against self incrimination.

I haven't looked up the law on that point, but I did look up sufficiently to satisfy myself that the fact that she had answered previous questions did not constitute a waiver. I am satisfied on that proposition, but now whether beyond that she gets a legal immunity, I am inclined to think she does but I haven't looked up the law on it.

The only additional thing I can think of I want to
67 urge on the motion for acquittal, and the reason I am not arguing it at length is because we have already argued it and the Court has decided that, I think erroneously, but at the present time I am bound by that decision.

The only thing I would wish to add to my motion, Judge, is if overnight we had an opportunity to look up the cases as to whether there has been a case cited on legal immunity I would like to cite them but, aside from that, that would complete my argument on my motion for acquittal.

THE COURT: I understand that you may have something else you want to urge, and I will not act on your motion tonight.

Now, let me ask you this in the interest of time, and not have the jury wait: Will you have any evidence?

MR. ROGGE: I will have to confer with my client. I don't think I will have any evidence, so we will come immediately to the question of considering the charge.

THE COURT: As to that, you have suggested the Barsky charge: you can make use of it.

MR. ROGGE: As a matter of fact it occurred to me when Your Honor asked me that, I was about to say to Your Honor whether you could take the suggestions we gave in the Fleischman case; they won't apply specifically because there was a group.

THE COURT: Well, out of that group I will ask
68 you to present those which you deem to be applicable to this case. Would you have that in the morning?

MR. MORGAN (deputy clerk of court): I have them.

THE COURT: Will you have them marked?

MR. ROGGE: I never ordered a copy.

THE COURT: Let me suggest this to you, so there won't be any question: You meet with Mr. Morgan and mark what they are so there will be no question.

Have you any question about that, Mr. Murray?

MR. MURRAY: No.

THE COURT: That will be your responsibility, Mr. Rogge, to see that there is nothing added to or deleted from them.

MR. ROGGE: That is agreeable.

THE COURT: That will be all then this afternoon, gentlemen.

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70 *Proceedings*

MR. ROGGE: May we approach the bench?

THE COURT: Yes.

(Thereupon counsel approached the Court's bench and the following proceedings were had out of the hearing of the jury:)

MR. ROGGE: I had another engagement last night so that we haven't completed our research on whether she got legal immunity as a result of Your Honor, as it is our contention we think erroneously, in overruling it, so that completes our argument. If we find any further matters to suggest we will present them.

THE COURT: Have you anything further?

MR. MURRAY: No, sir.

THE COURT: All right, then I will deny the motion.

MR. ROGGE: And the defense rests, and we renew the motion for an acquittal.

THE COURT: Very well, it will be denied.

MR. ROGGE: And here are the instructions.

THE COURT: Have you seen these?

MR. MURRAY: Yes, sir.

THE COURT: This was inadvertence, I assume, your number 8 relates to character witnesses. There has been none.

MR. ROGGE: Yes, Your Honor may strike that.

THE COURT: Do you want this 10? You have given it so I guess I am correct in assuming you want it.

71 Have you any objection to 10?

MR. MURRAY: I have no objection to it, but it is out of line with our plan to avoid any mention of the other—

THE COURT: That is the reason I marked it. If you want it— I thought the object was to stay away from it, but if you think the negative will be helpful to you, that is all right.

What about this question of quorum, Mr. Murray?

MR. MURRAY: Well, the Court instructed them in the Fleischman trial that there was a quorum.

THE COURT: Yes.

MR. MURRAY: I can't enlighten you very much on that. My own view is that it is a matter that cannot be collaterally attacked by the witness. It is a matter that should have been called to the attention of the committee at the time, and the certification here is presumed to be within the rules. If I had been sure about it I would have brought it out in the testimony, but I can't say that I am sure.

THE COURT: All right; I will say I will deny your prayers as you offer them except as I will make use of them in the general instructions which I will give.

MR. ROGGE: And then we usually approach the bench after Your Honor's charge?

THE COURT: Yes, except I am specifically interested in the one we talked about, namely, 10, unless I find
72 something else in here.

How much time do you want?

MR. MURRAY: I will take between 10 and 15 minutes altogether.

MR. ROGGE: Fifteen minutes is enough, Judge.

THE COURT: Very well.

* * * * *

84 *Court's Charge to the Jury*

THE COURT (Keech, J.): Members of the jury, the defendant here is on trial under an indictment

charged with violation of Title 2, Section 192 of the United States Code.

That part of that section as applicable to the case reads as follows:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before any committee of either House of Congress, wilfully makes default shall be deemed guilty of a misdemeanor."

It is now your duty to determine whether the defendant here is guilty or not guilty of that charge. It is my duty to instruct you as to the law applicable to this case, and that must govern you in your deliberations and in arriving at your conclusion. You are bound and obligated to follow the Court's instructions as to law, but you, the members of the jury, are the sole judges of the facts, and you must determine those facts for yourselves, solely on the basis of the relevant evidence adduced before you.

The Court is permitted to summarize and discuss the evidence in order to assist the jury in arriving at its conclusion; but, if your recollection of the evidence differs in any respect from the Court's recollection, then your recollection must prevail, because the final decision on the
85 facts is entirely within your province, while my instructions are binding on you only as to the law.

The fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn against her from that fact, because an indictment is merely the machinery and procedure that the law provides for bringing the defendant before the court and placing her on trial. That is the only function of an indictment.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to the defendant throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond

a reasonable doubt, and unless the Government sustains this burden and proves beyond a reasonable doubt that she committed the crime with which she is charged, you must find her not guilty.

But, you might ask, what is meant by the term "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not proof to an absolute or a mathematical certainty. By a reasonable doubt, as its name implies, is meant any doubt based on reason, not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence. Therefore if, after impartial comparison and consideration of all the evidence, you
86 can candidly say that you are not satisfied of the guilt of the defendant then you have a reasonable doubt. But, if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

If the facts in this case with regard to the defendant are as consistent with her innocence as with her guilt, you must find the defendant not guilty.

The mere fact that the defendant, Helen R. Bryan, was summoned by the House Committee on Un-American Activities to produce certain records before it creates no inference whatsoever that she was engaged in any subversive or un-American activities.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh all the testimony of all the witnesses who have testified before you. You are the sole judges of the credibility of the witnesses as you are the sole judges of the facts. In determining whether to believe the testimony of any witness, and in weighing the testimony of any witness, you may consider his demeanor

on the stand; his manner in testifying; whether he impresses you as having an accurate memory and recol-
87 lection, and whether he impresses you as a truth telling individual.

As I have said to you, the indictment charges the defendant with contempt of Congress in wilfully and deliberately failing to produce records before the committee of the House of Representatives.

It is admitted that the defendant was summoned by an authorized committee of the House of Representatives, which was the Committee on Un-American Activities, which was authorized to conduct an investigation, authorized by House Resolution 5 of the Seventy-Ninth Congress, adopted January 3, 1945, which summons directed the defendant to appear and produce before the committee certain records of the Joint Anti-Fascist Refugee Committee, specifically all books, ledgers and papers relating to the receipt and disbursements of money by or on account of the Joint Anti-Fascist Refugee Committee, or any subsidiary or subcommittee thereof, together with all correspondence, memoranda or communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946.

It is further also admitted that the defendant appeared before the congressional committee on April 4, 1946, and did then and there refuse to produce the records called for in the subpoena and thereby wilfully made default.

There has been some evidence introduced by the Government with reference to the various allegations in the indictment.

88 The defense has not disputed that a paper purporting to be a subpoena was served upon the defendant, but has intimated that such paper was not in fact a proper subpoena issued by authority of a House of Congress.

The Court instructs you, as a matter of law, that the Committee on Un-American Activities of the House of

Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance; that such committee had jurisdiction over the matters under consideration; that the documents requested were pertinent thereto; that the committee had a reasonable basis for issuing the subpoena in question and that the subpoena was not unreasonable in requesting production of the various documents therein described.

The Court instructs you further, as a matter of law, that the general rule in criminal cases is that a mistake in law on the part of the accused does not constitute justification for her act, and that if she deliberately and intentionally commits the act it is a crime.

The Court instructs you, as a matter of law, that ignorance is no part of the transaction. In this particular case, however, you have a right to consider, in the light of all the evidence produced, under the circumstances which have been presented, whether the acts of the defendant here were deliberate and intentional.

I instruct you that the opening statement of counsel for the Government and the argument of counsel for the Government and the defense at the conclusion of the case, are not evidence.

I want to stress to you two points:

First: Your determination of the guilt or innocence of this defendant must be reached solely on the basis of the relative evidence adduced at this trial, without any feeling of emotion, bias or prejudice, without any anger on the one hand, and without any sympathy on the other.

Second: The nature of the activities of the defendant, or the organization with which she is connected, is not an issue in this case, and it is your duty entirely to disregard in your deliberations any speculation on that subject.

The issues which you are called upon to determine are the basic elements of the offense with which the defendant has been charged that have been and will be defined by the Court.

It is incumbent upon the Government to prove each and all of the essential elements of the crime charged beyond a reasonable doubt. Briefly, the elements of this offense are as follows:

(1) That the Chairman of the Committee on Un-American Activities of the House of Representatives caused to be prepared a subpoena directed to the defendant to
90 appear before the committee and produce the records described therein.

(2) That such subpoena was signed by the chairman of said committee, and was served by a person designated by said chairman by placing the same in the possession of the defendant.

(3) That the defendant had custody or dominion and control over such records.

(4) That the defendant wilfully made default, that is, wilfully failed to produce the records called for by the subpoena.

The Court instructs you as a matter of law that one, or a combination of others, could have also produced the subpoenaed records is not a bar to the prosecution of the defendant if you find that the Government has proved beyond a reasonable doubt all of the elements enumerated.

Several times during the charge I have used the term "wilful" or "wilfully." "Wilful,' as used in Title 2, Section 192 of the United States Code, under which the defendant is indicted, means "deliberate and intentional", and not inadvertent or accidental. Thus, the motive of the defendant in failing to comply with the subpoena and her reason for such failure are not material, so long as you find that she did so intentionally and deliberately.

The charge in this indictment, although sometimes referred to as "contempt," does not mean a personal animosity or dislike toward the congressional com-
91 mittee or any of its members. The charge consists of the elements as I have defined them to you.

If you believe that the Government has proved, beyond a reasonable doubt, each and all of the elements, as outlined and explained, then you must find the defendant guilty. If, on the other hand, you believe that the Government has not proved, beyond a reasonable doubt, each and all of the elements, then you must find the defendant not guilty.

Gentlemen, have you anything further?

(Thereupon counsel approached the Court's bench and, out of the hearing of the jury, the following occurred:)

MR. ROGGE: Your Honor, the first point we want to make is the charge with reference to quorum.

THE COURT: I hold it as a mater of law.

MR. ROGGE: That is our objection to Your Honor's charge, that you did not give our requested charge on quorum.

THE COURT: Yes, sir.

MR. WOLF: We have an objection to the Court's charge with regard to finding that the Committee on Un-American Activities was a validly constituted committee of Congress; that the committee had jurisdiction over the matters under consideration that the documents requested were pertinent to the inquiry; that the committee had reasonable basis for issuing the subpoena, and that the subpoena was not unreasonable in requesting production of the various documents described in it, and request that in place of this finding the appropriate finding is in our earlier submission to the Court, and request our instruction be substituted for it.

92

We object further to the holding, as a matter of law, that the paper served on the defendant constituted an adequate subpoena.

THE COURT: I am afraid I didn't do that, but I will do it.

MR. WOLF: And the question of quorum, too, I am not sure of any instruction given to the jury.

MR. ROGGE: He has charged, as a matter of law, that it was a properly constituted committee.

MR. WOLF: We object to the charge as to what constitutes wilfulness and wilful default, and not inadvertent and accidental;

To that part of the charge involving a definition of deliberate and intentional, and ruling out consideration of the motive of the defendant.

Again, we are required, I think, to state in detail the reason for each objection unless they are waived.

MR. MURRAY: They have been fully argued before.

MR. ROGGE: And if Your Honor charged that the paper served on Miss Bryan was a valid and proper subpoena, it is understood we are objecting to that part of the charge without the necessity of coming to the bench again?

93 THE COURT: Yes.

MR. MURRAY: It may be stated that the failure of the Court to charge on the element of failure of the defendant to take the stand—

THE COURT (interposing): I mentioned it to Mr. Rogge yesterday and he asked me specifically not to do it.

(Thereupon counsel returned to the trial table and, in the hearing of the jury, the following occurred:)

THE COURT: Ladies and gentlemen, the Court neglected to call your attention to one thing, that the document which was served on Miss Bryan to appear and bring these papers before the committee was a legal document; in other words, was a valid subpoena.

Now, ladies and gentlemen, it becomes your duty to retire to the jury room to carefully and deliberately consider this case in the light of the testimony adduced under the instructions of law which I have given you.

After reaching the jury room, you will select a foreman from among your group, who will represent you when you return with your verdict.

This is a criminal case, of course, and therefore your verdict will have to be unanimous.

There being nothing further, you may retire and consider your verdict.

(Thereupon, at 11:20 o'clock a. m., the jury re-
94 tired to consider of its verdict, and the Court proceeded to the transaction of other business.)

(Thereupon, at 11:40 o'clock a. m., the jury notified the Deputy Marshal, and the Deputy Marshal informed the Court that the jury was ready with its verdict.)

(Thereupon, the Court being upon the bench, counsel for the Government, counsel for the defendant, and the defendant being present, the jury was returned into the courtroom and the following occurred:)

THE DEPUTY CLERK OF COURT: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN OF THE JURY: They have.

THE DEPUTY CLERK OF THE COURT: What say you as to the defendant Helen R. Bryan?

THE FOREMAN OF THE JURY: Guilty.

THE DEPUTY CLERK OF COURT: Members of the jury, your foreman says that you find the defendant Helen R. Bryan guilty, and that is your verdict, so say you each and all?

(The members of the jury indicated in the affirmative.)

* * * *

97 Washington, D. C.,
Thursday, April 8, 1948.

The above-entitled matter came on for hearing on motion for new trial or, in the alternative, a verdict of acquittal, at 12 o'clock noon, Thursday, April 8, 1948, in The District Court of the United States for the District of Columbia, in the Court House in the City of Washington, District of Columbia.

BEFORE:

HONORABLE RICHMOND B. KEECH, Associate Justice of The District Court of the United States for the District of Columbia.

APPEARANCES:

CHARLES B. MURRAY, ESQUIRE, Assistant United States Attorney, on behalf of the United States;

O. JOHN ROGGE, ESQUIRE; BENEDICT WOLF, ESQUIRE, and ROBERT H. GOLDMAN, ESQUIRE, on behalf of the Defendant.

98 *Proceedings*

MR. ROGGE: I wonder, since we are all here, should I go ahead and argue the same matter in the Bryan case?

THE COURT: Have you any objection?

MR. MURRAY: No. I would prefer it, as a matter of fact.

MR. ROGGE: In the Bryan case, making an oral and renewed motion for an acquittal, and making a motion for a new trial, I urge the points that have previously been urged, and there are several of them that I wish to stress.

1. I think that Your Honor and I referred to certain authorities, and I have since had a chance to look at Wigmore. I think Your Honor was in error in compelling Miss Bryan to answer after her claim of privilege. I do not think she waived that by answering one question, which really was under what may have been confusing circumstances back in June, and if Your Honor was erroneous in compelling her to testify, as I think Your Honor was, then, in my opinion, she got legal immunity, and this trial should not have taken place.

The second point that I wish to urge is one of the points that I have argued before, and on which I am going to submit an additional memorandum, and that is on the point of the quorum. I think, as I have stated with reference to the motion in the Fleischman case, the burden is on the Government to show beyond a reasonable doubt

99 that a quorum was actually, physically present at the

time the witness was sworn, and when there occurred the alleged refusal to produce the requested books and records; that if there is any presumption of regularity, and I deny that there is in this case, that a quorum existed, that is an abstract presumption under the authorities, and the presumption of innocence prevails, and that presumption of innocence, as Your Honor knows, is a very strong presumption. There is a presumption against suicide, but if it runs into the presumption of innocence, that prevails. There is a presumption of chastity in a woman, but if it runs into conflict with the presumption of innocence, the presumption of innocence prevails.

I have run into several cases. I think one was that of a woman being taken to a disorderly house, and the requirement was one of chastity, and the court said "Nothing doing, the presumption of innocence prevails."

You may say if there was a quorum at one time it is presumed to continue, but there are cases which will be in the memorandum we will submit to Your Honor to the contrary; so here, under all the authorities I am citing, not only must the Government show beyond a reasonable doubt that there was a quorum present at the time that Helen Bryan was sworn, and when she allegedly refused to produce the books and records, but the Government in making that proof cannot rely on that kind of presumption because any presumption they would bring
100 forward I do not think there is any doubt would run afoul of the presumption of innocence, and the presumption of innocence would prevail.

Next, the third thing I wanted to stress here, and I suppose this is something that would more appropriately await sentence, but since I am on my feet I will mention it anyway: I think the Government in this situation should be consistent. The Government made a great contention in the Barsky case that Helen Bryan was an employee, as a matter of fact, Mr. Murray referred to her

as a scapegoat, actually in court referred to her as that, so I say to Your Honor that the Government has to be consistent.

What you have here is a paid employee whose job depended on not producing the books and records, and so she did what the board suggested, she consulted with counsel and did not produce them. Since the Court decided the Barsky case on the theory that the top authority was the executive board, I say Helen Bryan should have the benefit of that.

So it is in the same vein in this particular proceeding that the defendant felt under all the circumstances on that question, had that same feeling that her job was at stake led her to feel that she must request a jury trial, but Your Honor will admit that, although we did not waive the jury trial, we made the trial of this case, in accordance with her wish, as easy and simple as any trial like this could be.

101 With her consent, authorization and approval, Mr. Murray will have to admit we stipulated all the facts in this case. Though it took a few hours to try it, we could have saved a couple of hours, maybe, if we had waived a jury, but we reached practically that effect in this case.

I would also want to call to Your Honor's attention one further thing, and that is that Helen Bryan has been a Government witness on at least three occasions that I know about in this general situation. She was a witness in the Barsky case. She was a witness, as I recall, in another case in the District, at least I remember her coming down, and I think she testified, and Mr. Wolf calls my attention she was also a witness before the grand jury. She has testified for the Government on at least four separate occasions.

Now, on one of those occasions, the last one, it is true she claimed her privilege. She had a trial which immediately followed, and which took place, and so after Your Honor overruled her claim of privilege she went ahead

and testified, so she has been a witness for the Government no less than four times.

Now, I wonder, having gone this far, whether I should describe any of the circumstances which will come up in a probation report with reference to her. Your Honor, I daresay, will not find any person in this country who will come up with a more outstanding report from the
102 Probation Depart. She comes from a long line of Presbyterian parentage; she got her early training in an exclusive girl's school, was graduated from Wesleyan with a B. M. degree. Her first job was in relief work. Her heart has always been in that work. Her first job was in Detroit where she had charge of the girls' activities, and as a result of that they offered her a job at a theological school in New York. We find with that training, after working three years she went to Pittsburgh where she was in charge of a girls' department in—

THE COURT (interposing): I don't want to cut you off, Mr. Rogge, but if you are going to give it to the Probation Officer I assure you I will read it.

MR. ROGGE: And from that point on, I have made my argument.

THE COURT: I assure you I will read it.

MR. ROGGE: I am sure Your Honor will. I think the only thing I had in mind was whether Your Honor would want to follow that which I know is the normal procedure in the Probation Department; Mrs. Fleischman is coming down on Monday, and perhaps that would be good procedure.

THE COURT: I think it would.

MR. ROGGE: Then would it be agreeable to ask for Friday, the 23rd as the date for sentence in both cases?

THE COURT: I know of no reason why it should not be done.

103 Is there anything you want to say?

MR. MURRAY: I think perhaps I should defend the Government in consistency.

THE COURT: I don't think you need do that because what I think he is driving at is the matter of competency.

MR. ROGGE: Yes.

MR. MURRAY: I have nothing to say as far as the sentence is concerned, that being a function of the Court.

THE COURT: Then I will say after you get the memorandum on quorum, let me have the benefit of what you may find.

MR. MURRAY: I will do that.

THE COURT: And I will ask you to do that having in mind the date fixed for the 23rd, and I assume you will not ask me to wait for this report from the Probation Department. That will go forward right away?

MR. ROGGE: That will go forward.

(The instance hearing was thereupon concluded.)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Monday, February 7, 1949

* * * * *

Before HONORABLE HENRY W. EDGERTON, E. BARRETT PRETTYMAN and JAMES M. PROCTOR, Circuit Judges:

* * * * *

No. 9851, January Term, 1949

HELEN R. BRYAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9852, January Term, 1949

ERNESTINA G. FLEISCHMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On motion of Mr. O. John Rogge, attorney for appellants, Mr. Benedict Wolf of the Bar of the Court of Appeals of New York was permitted to argue for appellants pro hac vice by special leave of Court.

Argument commenced by Mr. Benedict Wolf for Appellants, continued by Messrs. O. John Rogge for appellants and Charles B. Murray, attorney for appellee, and concluded by Mr. O. John Rogge.

* * * * *

United States Court of Appeals for the District of Columbia Circuit—Filed Apr. 8, 1949. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 9851

HELEN R. BRYAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia)

Argued February 7, 1949. Decided April 8, 1949.

Mr. Benedict Wolf of the bar of the State of New York, *pro hac vice*, by special leave of Court, and *Mr. O. John Rogge* for appellant.

Mr. Charles B. Murray, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, was on the brief, for appellee. *Mr. John D. Lane*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PRETTYMAN, and PROCTOR, JJ.

PER CURIAM: Like the appellant in *Fleischman* v. *United States*, decided today, the present appellant has been convicted of willfully making default before the Committee on Un-American Activities of the House of Representatives after being summoned to produce before it the records of the Joint Anti-Fascist Refugee Committee. Unlike Fleischman, the present appellant was custodian of the records and refused to produce them before some members of the Congressional Committee on April 4, 1946. The court instructed the jury in effect that a quorum of the Congressional Committee was present. For reasons set forth in our opinion in the *Fleischman* case, we think this was a material question of fact which should have been submitted to the jury.

Reversed.

PRETTYMAN, J., *dissenting*: I think that this judgment should be affirmed. The reasons for my dissent are stated in the dissenting opinion in No. 9852, *Fleischman* v. *United States*.

United States Court of Appeals for the District of Columbia Circuit—Filed Apr. 8, 1949. (S.) Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 9851

HELEN R. BRYAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Before: EDGERTON, PRETTYMAN and PROCTOR, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court with directions to award a new trial.

Per curiam.

Dated April 8, 1949.

Dissenting opinion by Circuit Judge Prettyman.

United States Court of Appeals for the District of Columbia Circuit—Filed May 24, 1949. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 9851

HELEN R. BRYAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

May 24, 1949.

Certificate of Service

I hereby certify that I have this day served a copy of the Designation of Record on O. John Rogge, Esquire, 401 Broadway, New York, N. Y., and on Benedict Wolf, Esquire, 160 Broadway, New York, N. Y., by mailing copies to them at their business addresses.

PHILIP B. PERLMAN,
Solicitor General.

Dated at Washington, D. C., this 24th day of May, 1949.

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the

foregoing pages numbered 1 to 74, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: Helen R. Bryan, Appellant, v. United States of America, Appellee, No. 9851, April Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fifth day of May, A. D. 1949.

[SEAL.] (S.) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

In the Supreme Court of the United States, October Term, 1948

No.

UNITED STATES, PETITIONER

v.

HELEN R. BRYAN, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix to Appellant's Brief.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the Designation of Record filed by the Petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the United States Supreme Court the entire transcript of record in the United States Court of Appeals for the District of Columbia Circuit, and any of the parties may refer in their briefs and argu-

ments to said transcript of record, including any part which has not been printed.

May 24, 1949.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.
O. JOHN ROGGE,
Per: MURRAY A. GORDON,
BENEDICT WOLF,
Counsel for Respondent.
Per: MURRAY A. GORDON,

☆ U. S. GOVERNMENT PRINTING OFFICE 1949

Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 838

UNITED STATES OF AMERICA, PETITIONER

v.

ERNESTINA G. FLEISCHMAN

No. 839

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN R. BRYAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit (F. R. 314-315; B. R. 72)[1] reversing respondents' convictions in the United States District Court for

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[1] The records in the *Fleischman* and *Bryan* cases will be designated by the letters F. and B., respectively.

the District of Columbia on charges of wilfully making default before a Committee of the House of Representatives.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (F. R. 305-314; B. R. 71) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered April 8, 1949 (F. R. 314-315; B. R. 72). The time within which to petition for writs of certiorari was extended to June 6, 1949, by Mr. Chief Justice Vinson. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the lack of a quorum of a congressional committee on the return of a subpoena to produce records constitutes a defense to a charge of wilful default, where objection to the production of the records is not made on that ground.

STATUTE INVOLVED

Revised Statutes, § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee estab-

lished by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Ernestina G. Fleischman, a member of the executive board, and Helen R. Bryan, executive secretary of the Joint Anti-Fascist Refugee Committee, were charged in separate indictments filed in the United States District Court for the District of Columbia with wilfully making default, in violation of R. S. § 102, by failing to produce records before a congressional committee in accordance with the summons of that committee (F. R. 5; B. R. 1-2). The indictments alleged that respondents were summoned to produce before the House Committee on Un-American Activities certain records of the Joint Anti-Fascist Refugee Committee; that they appeared before the Committee on April 4, 1946; that Mrs. Fleischman failed to produce the records, as she had power to do, and that Miss Bryan refused to produce the records; and that they thereby wilfully committed a default (F. R. 5; B. R. 2). Mrs. Fleischman had been jointly in-

dicted[2] with the petitioners in *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843 (petition for rehearing pending), but was tried separately.[3]

On March 29, 1946, after the failure of two previous attempts to obtain records of the Joint Anti-Fascist Refugee Committee from Barsky, the chairman of the executive board, and Miss Bryan, executive secretary (F. R. 109), the Committee on Un-American Activities issued a subpoena to each of the 17 members of the executive board, including Mrs. Fleischman, and another subpoena directed to the organization by name, calling upon each of them to appear on April 4, 1946, to testify and to produce the organization's books and records relating to the receipt and disbursement of money and correspondence with persons in foreign countries during the preceding 15 months (F. R. 97; B. R. 31). The subpoena directed to Mrs. Fleischman was served upon her (F. R. 80), and the subpoena directed to the organization by name was

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[2] The indictment against Mrs. Fleischman and her co-defendants consisted of two counts but the trial court directed a judgment of acquittal on the first count, which charged a conspiracy to defraud the United States and to commit an offense against the United States by depriving a congressional committee of records called for in subpoenas issued by the committee (F.R. 3-4, 9).

[3] The evidence on which the Government relied in the *Barsky* case to prove the pertinency of the records which the congressional committee subpoenaed was by stipulation admitted for the same purpose in the trials of respondents (F.R. 151-155; B.R. 24, 51). This evidence, which is summarized in our brief in opposition in the *Barsky* case (O.T. 1947, No. 766), is not material here.

served upon Miss Bryan, who accepted service in her capacity as executive secretary (B. R. 37). Mrs. Fleischman appeared before the Committee on April 4, 1946, stated that she was there in response to the subpoena, but declined to produce the records on the ground (which she read from a statement which was identical with those read by the other members of the executive board) that Miss Bryan had possession of them (F. R. 124-125). Miss Bryan likewise appeared on April 4, 1946, and admitted that she was the custodian of the records, but refused to produce them on the ground that the subpoena was "not valid" (B. R. 46). She also stated that she was uncertain whether she would produce the records even if the executive board of the organization should so direct her (B. R. 44). Respondents and all the members of the executive board were cited by the House for contempt of the Committee.

At the separate trials of respondents, a government witness testified in substance that he was unable to recall the particular members of the Committee on Un-American Activities who were present at the precise moments when respondents appeared since members left the hearing room sporadically, but he had a general recollection that at least a majority of the nine members were in attendance at all times during the day (F. R. 144, 147; B. R. 47-49, 50). The printed transcript of the Committee's proceedings on April 4, 1946,

showed that at least six different members of the Committee addressed questions to the several witnesses on that occasion, five members to Mrs. Fleischman (F. R. 125-127), and four to Miss Bryan (B. R. 35, 36, 46).

The trial court instructed the jury in each case "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the court also instructed the jury "that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation" (F. R. 283). In the *Bryan* case, the court advised counsel that he held as a matter of law that a quorum was present when the defendant appeared before the committee (B. R. 62).

No evidence was offered in behalf of respondents (F. R. 279; B. R. 54-55). They were convicted of having wilfully defaulted and each was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19).

The Court of Appeals, one judge dissenting, reversed each judgment solely on the ground that the instruction that a quorum was present invaded the province of the jury and was reversible error. The court stated that the question whether five mem-

bers, constituting a quorum of the Committee, were or were not present was a material question of fact in dispute which should have been left to the determination of the jury. The dissenting judge considered the presence of a quorum immaterial to the issue of wilful default, since respondents did not assert that their noncompliance with the subpoenas was due to the absence of a quorum of the Committee at the time and place designated in the subpoenas. In his opinion, proof of the presence of a quorum is not an essential element of a *prima facie* case of wilful default.[4]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred—

1. In holding that lack of a quorum of a congressional committee on the return of a subpoena *duces tecum* constitutes a defense to a charge of wilful default in failing to comply with the subpoena, notwithstanding that no suggestion that a quorum was lacking was made at the hearing and no contention was advanced at any time that noncompliance with the subpoena was due to lack of a quorum.

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[4] Another asserted error which was considered on the *Fleischman* appeal was whether the trial court should have directed an acquittal for failure of proof that Mrs. Fleischman was responsible for the nonproduction of the records. On this point also the Court of Appeals divided, but the majority held that the evidence was sufficient to support her conviction. The court did not consider other contentions which were identical with those raised in the *Barsky* case, or the question whether government employees should have been excluded from the jury.

2. In holding that the presence or absence of a quorum was a material factual issue which should have been left to the jury.

3. In reversing the judgments of conviction.

REASONS FOR GRANTING THE WRIT

The effect of the decision below is to require a congressional committee which has duly issued a subpoena *duces tecum* to go through the futile and time-consuming gesture of holding a formal meeting at the time specified in the subpoena even though the person who has been subpoenaed unqualifiedly declares that he will not honor the subpoena regardless of the composition of the committee or even if he does not appear at all. If the meeting is not held, according to the court below, the sanction prescribed by R. S. § 102 for contempt of Congress cannot be invoked. In our view, the orderly and efficient dispatch of congressional business militates against that result, at least unless it is coupled with a condition that the person subpoenaed make known that he objects to the production of the records on the ground that a competent committee is not present to receive them. The problem involves a novel and important aspect of congressional committee procedure which should be settled by this Court.

In *Blair* v. *United States,* 250 U. S. 273, 282, this Court stated that a witness before a court or grand jury "* * * is not entitled to challenge the authority of the court or the grand jury, provided

they have a *de facto* existence and organization." When members of Congress purport to function as a committee to receive records called for by a subpoena which has been duly issued by the authority of a House of Congress, it would seem inconsistent with the principle of the *Blair* decision to permit the person subpoenaed to flout the summons on the ground that the committee was incompetent, without even expressing a challenge on that ground. We think it was incumbent upon respondents, by making known their opposition to testifying and producing records before less than a majority of the Committee, to have afforded an opportunity for absent members to be summoned so as to meet that objection. The tendency and effect of respondents' conduct was not one whit different whether four or five members of the Committee were present at the precise moment of their appearance; in either case their refusal to produce the records deprived Congress of pertinent information in aid of its legislative function. Indeed, to the extent that the subpoena seeks merely the production of documents, it is not a subpoena to testify at all (cf. *Wilson* v. *United States,* 221 U. S. 361), and the presence or absence of a quorum is a wholly irrelevant consideration in relation to the failure to produce the documents. The demand for the documents could be satisfied merely by turning them over to the clerk of the committee, regardless of whether the committee was in fact sitting at the moment. The

gist of the indictment was the refusal to produce the documents at any time.

Respondents were duly served with subpoenas and, although they had the benefit of advice of counsel prior to the hearing (F. R. 251; B. R. 39, 43), at no time was any suggestion made by them, by any other witnesses, or by their counsel that a quorum was not present. Neither did any member of the Committee suggest the lack of a quorum. The default of respondents and the other witnesses was reported to the House of Representatives in due course and citations for contempt issued. It was not until their trials, two years later, that respondents sought to raise the point that a quorum of the Committee had not been present. It has been held in similar circumstances that although a person served with a subpoena may have an excuse for not obeying it, he cannot safely remain silent but must communicate his excuse to the tribunal. Thus in *Carman* v. *Emerson,* 71 Fed. 264, 267 (C. A. 8), the court said:

> * * * It is a contempt of court for a witness who is duly served with a subpoena to appear and testify to treat the command of the court with silent contempt, and neither appear nor take any means of bringing to the attention of the court the existence of facts which would excuse him from attending. The service of the writ of subpoena imposes upon a witness the duty of treating the process of the court with decent respect, and of either attending the court in person or causing to be

> brought to the attention of the court the facts which in law will excuse him from attending. If he does not do this, he justly subjects himself to an attachment which is not necessarily purged by simply showing that his employment was such as exempted him from attending court as a witness, or that he was not subject to be subpoenaed because of the distance he resided from the place where the court was held. * * * If he has a good answer to the exigencies of the writ, he must bring it to the attention of the court in apt time and manner on pain of being treated precisely as though he had no defense whatever.

This doctrine is equally applicable in a situation where, as here, a witness refuses to comply with a subpoena on one ground and later asserts an entirely different one for his noncompliance. It has been held that where the copy of a subpoena which was served upon a witness contained a discrepancy in the return date from that contained in the original subpoena, the error afforded no defense to contempt proceedings against him for failure to appear since he did not appear at either time but based his refusal on other grounds. *Leber v. United States,* 170 Fed. 881, 888 (C. A. 9). Similarly, it is a familiar principle that objections of a witness to a subpoena because of exemption from service are waived unless raised on the return day. *In re Hall,* 296 Fed. 780 (S.D. N.Y.), appeal dismissed, 2 F. 2d 1016 (C.A. 2)).

If we are right in these views, it follows that respondents were in no wise prejudiced by the challenged instruction since there is no question that they made no objection before the committee that a quorum was lacking.[5]

CONCLUSION

It is respectfully submitted that a question of importance which has not been, but should be, decided by this Court is involved, and, therefore, this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

[5] The issues herein are somewhat related to *Christoffel* v. *United States*, No. 528, this Term, which, however, involves false testimony actually given, and arises under a statute making it an offense to testify falsely "before a competent tribunal." Moreover, in the *Christoffel* case, we think the record supports the conclusion that a quorum was present within the meaning of the applicable statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 98

UNITED STATES OF AMERICA, PETITIONER

v.

ERNESTINA G. FLEISCHMAN

No. 99

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN R. BRYAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals in No. 98 are reported at 174 F. 2d 519 (F. R. 305–314) and in No. 99 at 174 F. 2d 525 (B. R. 71).[1]

[1] The records in the *Fleischman* and *Bryan* cases will be designated by the letters F. and B., respectively.

JURISDICTION

The judgments of the Court of Appeals were entered on April 8, 1949 (F. R. 314–315; B. R. 72). The time for filing the petition for writs of certiorari was extended by Mr. Chief Justice Vinson to and including June 6, 1949 (F. R. 317; B. R. 76). The petition was filed on June 3, 1949, and was granted on October 17, 1949 (F. R. 317; B. R. 76). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the lack of a quorum of a congressional committee on the return of a subpoena to produce records constitutes a defense to a charge of wilful default, where objection to the production of the records was not made on that ground.

STATUTE INVOLVED

Revised Statutes, § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question un-

der inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Prior to April 4, 1946, the date of the default involved in these cases, the Committee on Un-American Activities of the House of Representatives had unsuccessfully attempted to procure certain records from the Joint Anti-Fascist Refugee Committee (hereinafter refered to as the JAFRC), from the chairman of its executive board, Dr. Edward K. Barsky, and from its executive secretary, the respondent Helen R. Bryan (F. R. 107–109, 128, 244; B. R. 35–38). On March 29, 1946, in a further effort to secure the records, the Committee issued subpoenas to each of the known members of the executive board, among them the respondent Ernestina G. Fleischman, and summoned each of them to appear on April 4, 1946, to testify and produce the books, ledgers, records and papers of the JAFRC relating to the receipt and disbursement of moneys and correspondence with persons in foreign countries during the period from January 1, 1945, to and including March 29, 1946 (F. R. 97, 106, 109, 123–124, 128–129, 239). An identical subpoena directed to the JAFRC by name was issued and served upon respondent Bryan, who accepted service in her official capacity as executive secre-

tary (B. R. 36–37). Respondents Bryan and Fleischman, as well as others, appeared before the Committee on April 4, 1946, but each failed to produce before the Committee any of the records described in the subpoena (F. R. 110, 123–124, 142; B. R. 35–46). Instead, each board member appearing before the Committee read from identical typewritten documents stating that he or she individually did not have possession, custody or control of the books and records requested in the subpoena and, therefore, was unable to comply with the subpoena, but that such material was in the custody and control of respondent Bryan (F. R. 125, 145). In response to the question whether she personally would consent to the Committee's inspection of the books, respondent Fleischman indicated that she did not know and questioned the relevancy of such an inquiry (F. R. 130–131). Miss Bryan, on the other hand, admitted that she was the custodian of the records but refused to comply with the subpoena because "after consulting with counsel [she] came to the conclusion that the subpoena was not valid" (B. R. 38, 46). In addition, she indicated that she "didn't know" whether she would produce the records if she were directed to do so by appropriate vote of the executive board (B. R. 44). The members of the executive board and respondent Bryan were thereafter cited for contempt by the House of Representatives (92 Cong. Rec. 3761–3773).

On March 31, 1947, respondent Fleischman and the other members of the executive board were charged in a two-count indictment filed in the United States District Court for the District of Columbia with conspiracy to commit contempt of Congress by wilfully failing to produce records before a congressional committee in accordance with the summons of that committee and thereby wilfully making default, in violation of R. S. § 102 (*supra,* pp. 2–3) (count 1) and also with committing the substantive offense defined in that section (count 2) (F. R. 1–5). Respondent Bryan was charged in a separate indictment filed the same day with committing the same substantive offense (B. R. 1–2). Each of the two respondents was tried separately, Mrs. Fleischman having been out of the country when the other members of the executive board were tried.[2]

At the outset of the trial of respondent Fleischman, the first count of the indictment was dismissed (F. R. 10, 280). At both trials, gov-

[2] The remaining board members were tried together, found guilty on the second count, and their convictions were affirmed on appeal. *Barsky* v. *United States*, 167 F. 2d 241 (C. A. D. C.), certiorari denied, 334 U. S. 843, petition for rehearing pending, No. 766, O. T. 1947. The evidence adduced by the Government in the *Barsky* case to prove the pertinency of the records subpoenaed by the Committee was by stipulation admitted for the same purpose in the respondents' trials (F. R. 151–155; B. R. 24, 51). This evidence, which is summarized in our brief in opposition in the *Barsky* case, is not material here.

ernment witness Ernie Adamson, counsel for the Committee on Un-American Activities at the time of the offenses in question, testified that he could not undertake to state which members of the Committee were present at any particular time during the April 4, 1946, session of the Committee, at which respondents appeared, since the members, in accordance with their usual custom and practice, left and returned to the hearing room sporadically. He was certain, however, that at least five or six members were present all through the day, though he could not indicate which ones they were. (F. R. 144, 146–148; B. R. 47–50.)[3] The printed transcript of the Committee's proceedings on that date show that at least six different Committee members addressed questions to the several witnesses on that occasion, five members to Mrs. Fleischman (F. R. 125–130) and four to Miss Bryan (B. R. 35, 36, 46).[4] No evidence in this respect was

[3] The Committee on Un-American Activities consists of nine members. Rule X, Rules of the House of Representatives, Seventy-Ninth Congress, House Doc. No. 810, 78th Cong., 2d sess., p. 306.

[4] It appears from this transcript that respondent Fleischman was asked questions by Representatives Bonner (F. R. 125, 126), Landis (F. R. 125, 127, 129, 130), Wood (F. R. 125, 126, 128, 129, 130), Mundt (F. R. 126, 127), and Thomas (F. R. 127). Respondent Bryan was interrogated by Representatives Landis (B. R. 39, 40, 45), Mundt (B. R. 35, 43, 44, 45), Rankin (B. R. 46), and Wood (B. R. 36, 37, 38, 39, 40, 41, 42, 43, 44, 45).

offered on behalf of respondents (F. R. 279; B. R. 54–55).

The trial court instructed the jury in Fleischman's case that the elements of the offense were (1) issuance of a subpoena by the Committee, (2) service of the subpoena, (3) custody, dominion or control of the records in the defendant, and (4) wilful failure to produce them. In addition, the court instructed the jury in each case "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59–60). In Fleischman's case, the court further instructed the jury "that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation" (F. R. 283). In Bryan's case, the following request and ruling by the trial court occurred during the giving of the instructions (B. R. 62):

> Mr. ROGGE [counsel for Miss Bryan]. Your Honor, the first point we want to make is a charge with reference to quorum.
>
> The COURT. I hold it as a matter of law.

Each respondent was found guilty and sentenced to three months' imprisonment and to pay a fine of $500 (F. R. 6–7; B. R. 18–19).

The Court of Appeals, one judge dissenting, reversed both convictions on the ground that the question whether five members of the Committee, constituting a quorum, were present at the time of respondents' appearances was a material question of fact in dispute which should have been submitted to the jury (F. R. 305–307, 314–315; B. R. 72).[5] Accordingly, the instruction that as a matter of law a quorum was present, the majority thought invaded the province of the jury and was reversible error (F. R. 306). Judge Prettyman, dissenting, expressed the view that proof of a quorum was not an essential element of a *prima facie* case of wilful default because neither respondent asserted that her noncompliance with the subpoena was due to the absence of a quorum at the time and place designated therein (F. R. 308–314).

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

1. In holding that lack of a quorum of a congressional committee on the return of a subpoena *duces tecum* constitutes a defense to a charge of

[5] Alleged errors relating to the presence of government employees on the juries and other alleged errors identical with those relied on in the *Barsky* case were not considered by the Court of Appeals. In addition, respondent Fleischman contended that the trial court erred in refusing to grant a judgment of acquittal for failure of proof that she was responsible for the nonproduction of the records. A majority of the court (Judges Proctor and Prettyman), however, decided against her on this point.

wilful default in failing to comply with the subpoena, notwithstanding that no suggestion that a quorum was lacking was made at the hearing and no contention was advanced at any time that noncompliance with the subpoena was due to lack of a quorum.

2. In holding that the presence or absence of a quorum was a material factual issue which should have been left to the jury.

3. In reversing the judgments of conviction.

SUMMARY OF ARGUMENT

I

Brought under R. S., § 102, the prosecution in these cases was for wilfully *making default* after having been summoned by the authority of a Congressional Committee to produce papers upon a matter under inquiry. The essence of the offense was a wilful *failure to act* where a duty to act existed. The offense here was negative in character—a failure to do that which a legally imposed duty required to be done. The wilfulness of such failure to act was provable, and here proved, by positive acts and declarations by respondents, but this fact does not detract from the essentially negative character of the offense itself.

The *Christoffel* case, 338 U. S. 84, involving the affirmative offense of perjury, is clearly distinguishable. That case involved a prosecution for perjury under 22 D. C. Code (1940 ed.),

§ 2501, proscribing the wilful giving of false testimony before a "competent tribunal." It was held that in a prosecution under that statute, it was incumbent on the Government to establish and for the jury to find that at the exact time an allegedly false statement was made before a Congressional Committee, a quorum of the committee was present, since otherwise the committee would not have been shown to be a "competent tribunal." In these cases, the applicable statute imposes no duty on the Government to show that at the time of default, a quorum of the committee was present.

There is no question in these cases of the validity of the subpoenas themselves, and hence no issue as to the competence of the Committee to issue the subpoenas, or as to whether a quorum of the Committee concurred in their issuance.

When members of Congress purport to function as a committee to receive records called for by a subpoena which has been duly issued by the authority of a House of Congress, the subpoenaed person may not flout the summons on the ground that the committee was incompetent, without even expressing a challenge on that ground. The demand for the records could be satisfied by turning them over to less than a majority of the committee, to a single member of the committee, or indeed to the clerk of the committee. The gist of the indictments was the refusal to produce the records at any time. The effect of the offenses

charged was to deprive Congress of pertinent information in aid of its legislative function. It was quite irrelevant how many members of the Committe were present to hear respondents announce their refusal to comply with the subpoenas. Consequently, it was not error for the trial court not to submit to the jury, as a material issue in the case, the factual question of whether or not a quorum of the Committee was present when respondents appeared before it.

II

But even if the absence of a quorum of the Committee at the time respondents appeared and announced their refusal to comply with the subpoenas could be considered relevant had respondents declined to comply therewith on that ground, the quorum question was not relevant in this case because they did not in fact base their refusal to comply on that ground. No question as to the presence or absence of a quorum was raised by any one at the time of respondents' appearance before the Committee. It was not until their trials, two years later, that respondents sought to raise the quorum question. Under these circumstances, the principle, announced in numerous lower court decisions, that one who may have an excuse for not obeying a subpoena may not safely remain silent, but must communicate his excuse to the tribunal or suffer the consequences of wilful contempt, should here control.

This was the view of the minority of the Court in the *Christoffel* case. Under this view, respondents were in no wise prejudiced by the challenged instruction which in effect removed the quorum question from the jury's consideration, since there is no question that they made no objection before the Committee on this ground.

If, therefore, contrary to the view of Judge Prettyman, dissenting below, and to our primary contention in this case, it should be felt that the *Christoffel* decision stands in the way of reversal of the judgments below, we submit that that decision should be reconsidered and overruled.

ARGUMENT

I

WHERE THE OFFENSE CHARGED IS WILFUL FAILURE TO PRODUCE RECORDS IN RESPONSE TO A COMMITTEE SUBPOENA, AS DISTINGUISHED FROM PERJURY BEFORE THE COMMITTEE, THE PRESENCE OR ABSENCE OF A QUORUM OF THE COMMITTEE AT THE TIME OF APPEARANCE AND REFUSAL IS IMMATERIAL; "CHRISTOFFEL V. UNITED STATES," 338 U. S. 84, IS PLAINLY DISTINGUISHABLE

In *Christoffel* v. *United States*, 338 U. S. 84, this Court held that in a prosecution under 22 D. C. Code (1940 ed.), § 2501, providing for the punishment of "Every person who, having taken an oath or affirmation before a *competent tribunal*, * * * that he will testify * * * truly, * * * wilfully and contrary to such oath or

affirmation states or subscribes any material matter which he does not believe to be true" [italics added], it is necessary for the Government to prove that at the exact time an allegedly false statement was made before a Congressional Committee a quorum of the committee was present. The reason for this holding was that a committee without a quorum is not a "competent" committee and therefore not a "competent tribunal" within the meaning of the perjury statute there involved. The narrow issue in that case was whether it was proper to instruct the jury that if a quorum of the committee was present at the beginning of a session and no question of the lack of a quorum was thereafter made, the absence of a majority later in the session would not affect the existence of the committee as a competent tribunal—this having been the traditional House custom and practice. See our brief in the *Christoffel* case, No. 528, O. T. 1948, pp. 15–18, 23–24. The Court held, in a five-to-four decision, that such an instruction was erroneous.

While the instant case has some features in common with the *Christoffel* case, the issue here is different. Each of the respondents was convicted under R. S., § 102, *supra*, pp. 2–3, as a "person who having been summoned as a witness by the authority of either House of Congress * * * to produce papers upon any matter under inquiry before either House, * * * or any committee of either House of Congress, wil-

fully *makes default*" [italics added]. The essence of the offense charged was a wilful *failure to act* where a duty to act existed. While such failure to act may be proved, and was here proved, by evidence of certain positive acts, nevertheless the actual offense, unlike the offense of perjury, consists of something negative rather than affirmative—a failure to do that which a legally imposed duty requires to be done.

There is no question in this case, it must be emphasized, of the validity of the subpoenas themselves. Hence there is no issue as to the authority or competence of the Committee to issue the subpoenas, or as to whether a quorum of the Committee concurred in the issuance of the subpoenas. The simple issue is whether, valid subpoenas requiring respondents to produce certain records having been issued, it was necessary for a quorum of the Committee to be present when respondents appeared and announced their intention not to comply with the subpoenas, in order for them to be guilty of wilful "default" under the statute. The majority below held that this was required, and that consequently it was incumbent on the Government to establish, as a material part of its case, and for the jury to find, under proper instructions, that a quorum of the Committee was present at the time of respondents' appearance and contumacious refusal to comply with the subpoenas. The dissenting judge felt that this was not necessary, that the Govern-

ment was not required to establish this as part of its case, that the jury did not have to so find, and that consequently there was no error in the instruction which in effect eliminated this question from the jury's consideration. We submit that the dissenting judge was clearly correct.

The effect of the decision below is to require a congressional committee which has duly issued a subpoena *duces tecum* to go through the futile and time-consuming gesture of holding a formal meeting at the time specified in the subpoena even though the person who has been subpoenaed unqualifiedly declares that he will not honor the subpoena regardless of the composition of the committee or even if he does not appear at all. If the meeting is not held, according to the court below, the sanction prescribed by R. S. § 102 for contempt of Congress cannot be invoked. In our view, the orderly and efficient dispatch of congressional business militates against that result.

In *Blair* v. *United States,* 250 U. S. 273, 282, this Court stated that a witness before a court or grand jury "* * * is not entitled to challenge the authority of the court or the grand jury, provided they have a *de facto* existence and organization." When members of Congress purport to function as a committee to receive records called for by a subpoena which has been duly issued by the authority of a House of Congress, it would seem inconsistent with the prin-

ciple of the *Blair* decision to permit the person subpoenaed to flout the summons on the ground that the committee was incompetent, without even expressing a challenge on that ground. The tendency and effect of respondents' conduct was not one whit different whether four or five members of the Committee were present at the precise moment of their appearance; in either case their refusal to produce the records deprived Congress of pertinent information in aid of its legislative function. Indeed, to the extent that the subpoena seeks merely the production of documents, it is not a subpoena to testify at all (cf. *Wilson* v. *United States,* 221 U. S. 361), and the presence or absence of a quorum is a wholly irrelevant consideration in relation to the failure to produce the documents. The demand for the documents could be satisfied merely by turning them over to the clerk of the committee, regardless of whether the committee was in fact sitting at the moment. The gist of the indictments was the refusal to produce the documents at any time.

We respectfully recommend to the Court the reasoning and conclusions of the dissenting judge below. He said:

> The indictment was for a willful default in failing to respond to a subpoena. A default is negative. It is not an act but is a failure to act. A person subpoenaed to produce books consciously and deliberately

does not produce them. He is in default. [F. R. 309.]

* * * * *

A willful default may be evidenced by a declared refusal to respond, or it may be simply a deliberate failure to do anything. A subpoenaed person might appear before the full committee and elaborately, vociferously and defiantly declaim his rebellion against the summons and the committee. Another subpoenaed person might, without saying anything to anybody, but with deliberate resolve to avoid obedience, simply go fishing on the appointed day. The latter's default is as complete as that of the former. Whatever may be the factual circumstances, the default is completed when the summons is not obeyed, and if the disobedience is intentional, a willful default has occurred. [F. R. 309.]

* * * * *

The trial judge told the jury that the elements of the offense are (1) a valid subpoena, (2) legal service, (3) custody, dominion or control over the records, and (4) a willful failure to produce. I think that was correct. I think that it makes no difference whether a subpoenaed person actually makes a declaration of refusal to comply or, if he makes one, who hears it. I think that if these persons had intentionally stayed in New York and done nothing, they would have committed willful default. To be sure, an intent to default is plainer if there be a proclaimed refusal to respond.

But such proclamation is not essential; much less is it essential that there be a proclamation of refusal in the presence of a quorum of the Committee. A stated refusal to respond is merely evidence of intent and might be made to members of the Committee, one member, a representative, or someone not connected with the Committee; or intent might be proved without any specific declaration of refusal. A default, in my view, is complete when there is an intended failure to respond to the subpoena. [F. R. 310.]

* * * * *

My view is that if failure to comply and intention not to comply are proved, and if the accused does not assert that he wished and tried to comply, it is immaterial whether he appeared before a quorum or not. Therefore, I do not think it was error for the trial court to fail to submit to the jury, as a material issue in this case, the question of fact whether there was or was not a quorum of the Committee present when appellant made her statement. [F. R. 312.]

II

IN ANY EVENT, SINCE RESPONDENTS DID NOT BASE THEIR REFUSAL TO PRODUCE THE SUBPOENAED RECORDS ON ASSERTED ABSENCE OF A QUORUM OF THE COMMITTEE TO RECEIVE THEM, THEY COULD NOT, AT THEIR SUBSEQUENT TRIAL FOR WILFUL DEFAULT, BASE THEIR DEFENSE ON THIS GROUND

Under the preceding point, we have urged that, the subpoenas being valid, the question of whether

or not a quorum of the Committee was present when respondents appeared and refused to comply therewith could under no circumstances be considered a relevant issue. Here we urge that, even if the presence of a quorum could be considered relevant had respondents declined to comply with the subpoenas on the announced ground that a quorum was not present to receive the sought for documents, the quorum question was clearly not relevant in this case because the refusal to produce the documents was never based on this ground.

It is undisputed that neither respondent, when she appeared before the Committee, based her refusal to produce the requested records on claimed absence of a quorum of the Committee to receive them. Though respondents had the benefit of advice of counsel prior to the hearing (F. R. 251; B. R. 39, 43), at no time was any suggestion made by them, by any other witnesses, or by their counsel that a quorum was not present. Neither did any member of the Committee suggest the lack of a quorum. Nobody, in fact, at any time prior to the trial of these cases, ever raised any question as to absence of a quorum when respondents appeared before the Committee. The default of respondents and the other witnesses was reported to the House of Representatives in due course and citations for contempt issued. It was not until their trials, two years later, that respondents

sought to raise the point that the presence of a quorum of the Committee had not been proved.*

Under these circumstances, the rule of *Carman* v. *Emerson*, 71 Fed. 264, 267 (C. A. 8), would seem to be applicable. It was there held that although a person served with a subpoena may have an excuse for not obeying it, he cannot safely remain silent, but must communicate his excuse to the tribunal or suffer the consequences of wilful contempt. The Court said (71 Fed. at 267):

> * * * It is a contempt of court for a witness who is duly served with a subpoena to appear and testify to treat the command of the court with silent contempt, and neither appear nor take any means of bringing to the attention of the court the existence of facts which would excuse him from attending. The service of the writ of subpoena imposes upon a witness the duty of treating the process of the court with decent respect, and of either attending the court in person or causing to be brought to the attention of the court the facts which in law will excuse him from attending. If he does not do this, he justly subjects himself to an attachment which is not necessarily purged by simply showing that his employment was such as exempted him from attending

* As we have pointed out at pp. 6–7, *supra*, the uncontradicted evidence of the Government at the trial was to the effect that a quorum of the Committee was at all times present during the appearances of respondents before it.

> court as a witness, or that he was not subject to be subpoenaed because of the distance he resided from the place where the court was held. * * * If he has a good answer to the exigencies of the writ, he must bring it to the attention of the court in apt time and manner on pain of being treated precisely as though he had no defense whatever.

This doctrine is equally applicable in a situation where, as here, a witness refuses to comply with a subpoena on one ground and later asserts an entirely different one for his noncompliance. It has been held that where the copy of a subpoena which was served upon a witness contained a discrepancy in the return date from that contained in the original subpoena, the error afforded no defense to contempt proceedings against him for failure to appear, since he did not appear at either time but based his refusal on other grounds. *Leber* v. *United States,* 170 Fed. 881, 888 (C. A. 9). Similarly, it is a familiar principle that objections of a witness to a subpoena because of exemption from service are waived unless raised on the return day. *In re Hall,* 296 Fed. 780 (S. D. N. Y.), appeal dismissed, 2 F. 2d 1016 (C. A. 2).[7]

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[7] See also *United States* v. *Groves,* 18 F. Supp. 3, 5 (W. D. Pa.); *London Guarantee & Accident Co.* v. *Doyle & Doak,* 134 Fed. 125, 128 (C. C. E. D. Pa.), certified question relating to another issue answered *sub nom. Doyle* v. *London Guarantee Co.,* 204 U. S. 599.

Under the circumstances of this case, we submit that the following observations of Mr. Justice Jackson, in his dissenting opinion in the *Christoffel* case (338 U. S. at 91–92), in which three other members of the Court joined, should be adopted by the Court:

> * * * In the absence of objection raised at the time, and in the absence of any showing of a rule, practice or custom to the contrary, this Court has the duty to presume that the conduct of a Congressional Committee, in its usual course of business, conforms to both the written and unwritten rules of the House which created it. * * *
>
> * * * * *
>
> * * * the issue is not whether a quorum is required in order for the Committee to be a competent tribunal, but whether committee rules, practices and records, and congressional rules, practices and records in analogous situations, are subject to attack by later oral testimony and to invalidation by the courts.

It may be assumed, *arguendo,* that if either respondent raised the question of no quorum when she appeared before the Committee, and if her objection, being well taken, had been overruled, she would have been at liberty to "walk out"; but since neither raised any such question, having based her refusal to comply with the subpoena on entirely different grounds, she could

not later, at the trial, be heard to say that her refusal did not amount to wilful default within the meaning of the statute because of the subsequently claimed absence of a quorum. *Id.*, pp. 92–93.

If we are right in these views, it follows that respondents were in no wise prejudiced by the challenged instruction since they made no objection before the Committee that a quorum was lacking.

If, contrary to the view of Judge Prettyman below and that presented earlier in this brief, it should be felt that this Court's decision in *Christoffel* v. *United States,* 338 U. S. 84, stands in the way of reversal of the judgments of the court below, the Government respectfully urges that that decision be reconsidered. The short time in which that decision has been in effect has precluded action taken in reliance upon it and, if that decision is deemed erroneous, it is better that that be made clear sooner rather than later, when a different ruling might touch the asserted rights of those who may claim to have acted in the light of the *Christoffel* decision.

The Government's reasons for believing *Christoffel* to have been wrongly decided need no more statement than that already available in the dissenting opinion in that case. These cases, no more than *Christoffel,* justify judicial rejection of the congressional judgment, evidenced here by contempt citations voted by the full House, that

the procedures here taken were within the authority of the Committee. Those who, like respondents, do not raise objections to lack of a quorum when they can be met and who do not even suggest that they would not have defaulted had a quorum been present, are hardly in a position to ask this Court to reject the considered view of a governmental branch of equal stature.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
ERNESTINA G. FLEISCHMAN.

UNITED STATES OF AMERICA,
Petitioner,
v.
HELEN R. BRYAN.

ANSWERING BRIEF TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

Nos. 838, 839

UNITED STATES OF AMERICA,

Petitioner,

v.

ERNESTINA G. FLEISCHMAN.

UNITED STATES OF AMERICA,

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v.

HELEN R. BRYAN.

ANSWERING BRIEF TO PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

The opinions of the Court of Appeals in reversing respondents' convictions in the United States District Court for the District of Columbia on charges of wilfully making default before a Committee of the House of Representatives are reported at 174 Fed. 2d 519 (F. R. 305) and 174 Fed.

2d 525 (B. R. 71) in the *Fleischman* and *Bryan* cases, respectively.*

Jurisdiction

The judgments of reversal of the Court of Appeals were entered April 8, 1949 (F. R. 314-315; B. R. 72). Upon application of the petitioner, the time to petition for writs of certiorari was extended to June 6, 1949, by Mr. Chief Justice VINSON; thereafter by an order dated June 10, 1949, this Court granted respondents until August 10, 1949, to file their answering briefs to the petitions for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b) (2) and 45(a), F. R. Crim. P.

Question Presented

Whether in a prosecution for an alleged wilful refusal to produce records summoned by a Congressional committee the presence of a quorum of that committee at the hearing at which the offense was allegedly committed is a material issue of fact to be determined by the jury.

Statute Involved

Revised Statutes, § 102, as amended, 52 Stat. 942, 2 U. S. C. 192, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the Two Houses of Congress, or any committee of either House of Congress, willfully

* The records in the *Fleischman* and *Bryan* cases will be designated by the letters "F.R." and "B.R.", respectively.

> makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Counter-Statement

These are companion cases to that of *Barsky, et al.*, v. *United States*, 167 Fed. 2d 241, cert. den. 334 U. S. 843 (petition for rehearing pending), but were tried separately.* A more detailed statement of some of the facts involved upon the instant petition is found in the petition for certiorari in that case (see *Barsky* Petition, pp. 1-9).

The indictment herein charged respondents with the misdemeanor of personally committing on April 4, 1946 a contempt of the House Committee on Un-American Activities of the House of Representatives (sometimes hereinafter referred to as the "House Committee"). The said alleged contempts arose out of the investigation of the Joint Anti-Fascist Refugee Committee (hereinafter referred to as "JAFRC"), a licensed, unincorporated relief association (B. J. A. 303, 328, 540-3), by the House Committee. Respondent Fleischman is a member of the Executive Board, and respondent Bryan is employed as Executive Secretary of that organization.

On December 4, 1945, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon the respondent Bryan or Dr. Edward Barsky, the Chairman of the JAFRC Executive Board, to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concern-

* By stipulation of counsel certain of the testimony of the *Barsky* case was admitted herein subject to certain specified objections (F. R. 105, 113, 114 ff; B. R. 22A, 33A, 88A.) References to the *Barsky* record will be hereinafter designated as "B.J.A."

ing JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (F. R. 108; see B. J. A. 221-222). Respondent Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (B. J. A. 217, 22). On that day she and Dr. Barsky were instructed by a resolution adopted by unspecified and unnamed members of the Executive Board of the JAFRC to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 9, F. R. 241-2). The respondent Bryan appeared before the House Committee on or about January 24, 1946 but did not produce the summoned records (F. R. 109).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to foreign countries (B. J. A. 223-225). This subpoena was served on January 28, 1946 and Dr. Barsky appeared on the adjourned date of February 13, 1946 (F. R. 109, B. J. A. 421-434). Two days prior to his appearance, five members of the Executive Board met* and a resolution was adopted ** reiterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records

* Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley (F. R. 243).

** The minutes of the meeting indicate that 7 other members of the Board voted in absentia; Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach (F. R. 244).

(Gov. Ex. 10, F. R. 243-4). The respondent Fleischman was not present at that meeting and did not vote on the resolution; and the respondent Bryan, being only an employee, did not, of course, vote.

At the February 13th hearing before the House Committee Dr. Barsky was questioned and testified, but did not produce the summoned books and records (F. R. 109).

Thereafter the House Committee, on March 29, 1946, issued 16 individual mandates addressed to the "Sergeant at Arms", or his "Special Messenger", to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (F. R. 106-7, 140-1). The parties to be summoned, including respondent Fleischman, comprised all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus; and the respondent Bryan. Each mandate, in terms, further instructed the Sergeant at Arms to bring with him all books and records of the JAFRC from January 1, 1945 to April 14, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (F. R. 97, 140-1). Service was made on the respondent Fleischman on March 29, 1946 (F. R. 98), and on the same date the respondent Bryan was served with such a subpoena addressed to the JAFRC (B. R. 31-2A).

Ernestina Fleischman appeared on April 4, was sworn and testified, but she did not produce the records summoned (F. R. 123 ff). None of the other witnesses produced those records (F. R. 110, 142). In explanation of her action, the respondent Fleischman submitted a statement which indicated that Helen Bryan as Executive Secretary of the JAFRC had custody and control of the documents sought and was responsible for the production or non-production thereof (F. R. 125).

Helen Bryan also appeared that day and refused to produce the books and records (F. R. 142). In a written statement which she sent to the Committee she informed the

Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (B. J.A. Gov. Ex. 6, pp. 103-105).

The foregoing action of respondents before the House Committee at the hearing of April 4, 1946 is the subject matter of the instant prosecution.

On March 31 of the next year, 1947, respondent Fleischman together with all the members of the JAFRC Executive Board except John T. McManus were indicted by the Grand Jury on two counts: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged wilful and deliberate refusal to produce the aforementioned books and records. Respondent Bryan was indicted on the substantive count alone (B. R. 1A-2A).

At the outset of the *Fleischman* trial the conspiracy count of the indictment was dismissed in view of the determination upon the *Barsky* trial that there was no evidence to sustain the charge (F. R. 9, 287). Each respondent was convicted of the substantive charge, and was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19A).

At the trials, the prosecution attempted to show the presence of a quorum at the April 4 hearing (F. R. 144 ff; B. R. 47A ff) and respondents, on cross examination and in their motions, requests, and objections, put in issue the presence of such a quorum. Upon appeal, respondents assigned as error the following Trial Court instruction to the jury in each case: "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the Court also in-

ructed the jury "that the members of the committee be-
ore whom the defendants appeared, pursuant to the sub-
oenas served on them, constituted a sufficient quorum to
arry on the investigation" (F. R. 283). In the *Bryan* case,
he Court advised counsel that it held as "a matter of law"
hat a quorum was present when the defendant appeared
efore the House Committee (B. R. 62A).

The Court of Appeals for the District of Columbia, one
udge dissenting, reversed each judgment on the ground
hat the presence of a quorum of the House Committee at
he hearing of April 4 was a material question of fact in the
lleged offense and should have been submitted to the jury.*

Argument

Petitioner's principal contention before this Court is
hat respondents had no standing to put in issue the pres-
nce of a quorum of the House Committee at the April 4
earing in that respondents did not suggest the absence of a
uorum at the hearing.** The full answer to this conten-
ion appears in *Christoffel* v. *United States*, 69 S. Ct. 1447,
here a witness charged with the commission of perjury
efore a Congressional committee raised the question of
uorum for the first time upon the prosecution and this
'ourt held:

* Judge EDGERTON, the author of the majority opinion on the quorum ques-
on, further found that since no evidence was produced that respondent
leischman had the power or ability to produce the records subpoenaed, the
rial Court erred in refusing to direct a verdict of acquittal in her case.
ROCTOR and PRETTYMAN, *JJ.*, were of a contrary view on this point and so
he Court of Appeals reversed on the instructions alone.

** In the argument of petitioner it is stated that "at no time was any
uggestion made by them, by any other witnesses, or by their counsel that a
uorum was not present" (p. 10). The foregoing statement is not sustained
y the records in the instant cases. There is no testimony as to what the
ther witnesses did at the hearing in this connection; and so far as counsel is
oncerned the record is plain that he was not in the presence of the House
ommittee during the hearing and was obviously in no position to raise the
oint of quorum (F. R. 146)—indeed, since the House Committee was in
xecutive Session counsel had no way of ascertaining which members of the
ommittee were present while a witness testified.

> ". . . Witnesses in committee hearings cannot be required to be familiar with the complications of parliamentary practice. Even if they are, the power to raise a point of no quorum appears to be limited to members of the committee. . . . In a criminal case affecting the rights of one not a member, the occation of trial is an appropriate one for petitioner to raise the question." *Christoffel* v. *United States*, *supra*, at 1450.

Petitioner further suggests that neither a meeting of the committee nor a quorum thereof is an essential or material element of the offense where the summoned party announces in advance the intention to default (see Petition, p. 8) or where the production of records is sought (*id.*, p. 9).

The novel doctrine of "anticipatory contempt" urged by petitioner is without precedent. For a person who proclaims his intended disobedience of a Congressional subpoena may not be held in contempt unless and until he fails to comply with the subpoena and a threat to refuse to testify before a committee, no matter how widely publicized or how strongly proclaimed, is not contempt until a proper subpoena has been served and the witness has failed to appear before the committee as required. Surely a witness may not be held in contempt if, after being served with a subpoena but before the time for compliance the committee recess indefinitely or is dissolved. And if one or both of the respondents had proclaimed in New York their intent to disobey the subpoena, in the presence of many witnesses, but then actually appeared in Washington before the House Committee at the time and place called for in the subpoena, they could not be in contempt. At the very least a *locus poenitentiae* must be offered them. In any event, if the doctrine of "anticipatory contempt" is ever to be adopted it will have to find its origin in some other case for the evidence here is that neither Bryan nor Fleischman voted on the JAFRC resolutions which preceded the hearing of April

4. Nor did they otherwise announce an intention to defy the subpoena for April 4.

Nor is the materiality of the question of a quorum affected by the circumstance that the subpoenas called for the production of records in connection with the appearance and testimony of respondents before the Committee. The crime with which respondents are charged is defined by statute not by the nature of the information sought. It is therefore decisive that Section 192 of Title 2 U. S. C. proscribes the failure to testify or produce papers "*before . . . any committee of either House of Congress*" (emphasis added). In *Christoffel* v. *United States, supra*, the crime of perjury charged was defined by statute as wilfully testifying falsely "before a competent tribunal" and, accordingly, this Court held that an essential element of the proof of perjury before a Congressional committee was the presence of a quorum of the committee at the time of the charged perjury.

> ". . . An essential part of a procedure which can be said fairly to inflict such a punishment is that all the elements of the crime charged shall be proved beyond a reasonable doubt. An element of the crime charged in the instant indictment is the presence of a competent tribunal . . .
>
> "A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction . . . " (69 S. Ct., 1450).

Similarly, in the cases at bar, the statutory offense is default "before any committee of either House of Congress" and, accordingly, an essential element of the crime is that the default must have occurred before a committee; and since a committee is constituted *qua* committee only if a quorum thereof is present,* the existence of such a quorum is a material element of the offense charged.

* In the Court below, petitioner conceded that the contempt of a committee cannot be committed unless the committee *qua* committee has met (see 174 Fed. 2d. 519, 520).

Moreover, apart from statute, the indictments herein charged that respondents "were summoned to produce before the Congressional Committee on April 4, 1946" certain designated records* (F. R. 5; see also B. R. 2A.) The crime thus charged was not committed or proven unless the alleged default occurred before the House Committee *qua* Committee.** Via the indictment, as by the terms of the statute, the prosecution must prove as a material element of the charged offense the presence of a quorum at the time of the alleged offense.

As a material issue, the question of whether a quorum of the House Committee was present on April 4 was an issue of fact for the jury. *Christoffel* v. *United States*, *supra*; see also *Briggs* v. *United States*, 24 Fed. 2d 961, 962; *Ewing* v. *United States*, 37 Fed. 2d. 287, 288; *Stole* v. *State*, 163 So. 504, 173 Miss. 755; *State* v. *Grodzins*, 9 S. W. (2) 808 (Mo. App.). As the Court below held:

> "A quorum of the Congressional Committee was five members. Whether five members were or were not present was a disputed question of fact. It was a material question, assuming there was evidence that (contrary to her own testimony) the records were in appellant's control. On that assumption, therefore, the question whether a quorum was present should have been submitted to the jury. But the court instructed the jury, over objection, that 'as a matter of law . . . the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation.' We think

* Read literally, the subpoenas here involved are defective writs of seizure addressed to the Sergeant At Arms of the House of Representatives commanding him to bring before the Committee certain records. There was no proof that respondents were in default of the express terms of the subpoenas since the record in both cases is barren of any showing that the Sergeant At Arms or his Special Messenger ever made any demand whatsoever for books and records upon the respondents here to which the latter failed to respond.

** In this view of the question before the Court it is unnecessary to consider or pass upon the power of the House Committee to compel the production of records before its clerk or any person or body other than the House Committee.

this was error. Even if the evidence that a quorum was present had been conclusive the instruction would have been erroneous. In a criminal case 'a judge may not direct a verdict of guilty no matter how conclusive the evidence' nor direct the jury to find a material fact against the defendant" (174 Fed. 2d., 520).

Conclusion

The decision of the Court of Appeals is correct and no conflict of decisions is involved in the question presented. The questions involved have been settled within the last few weeks by this Court. We therefore respectfully submit that this petition for a writ of certiorari should be denied and that the writ be granted only as to those questions presented in the cross-petition to be filed with the Court by respondents herein.

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HELEN R. BRYAN.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 98

UNITED STATES OF AMERICA,

Petitioner,

v.

ERNESTINA G. FLEISCHMAN.

No. 99

UNITED STATES OF AMERICA,

Petitioner,

v.

HELEN R. BRYAN,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinions of the Court of Appeals for the District of Columbia Circuit reversing the convictions of both respondents are reported (in No. 98) at 174 F. 2d 519 (F. R. 305) and (in No. 99) at 174 F. 2d 525 (B. R. 71), respectively.*

* The records in the *Fleischman* and *Bryan* cases will be cited herein as "F. R. ——" and "B. R. ——".

Jurisdiction

The petitions of the United States for writs of certiorari were granted on October 17, 1949. Jurisdiction is conferred by 28 U. S. C. 1254 (1) and reference is made to Rules 37(b)(2) and 45(a), F. R. Crim. P.

Question(s) Presented

The petitions of the United States tendered one question herein: "Whether the lack of a quorum of a Congressional Committee on the return of a subpoena to produce records constitutes a defense to a charge of wilful default, where objection to the production of the records is not made on that ground" (Brief for the United States, p. 2).

These causes, arising from the same circumstances which yielded *Barsky, et al.* v. *United States*, 167 F. 2d 241, *cert. den.* 334 U. S. 843 (Petition for Rehearing pending), are companions to the latter. The questions tendered in *Barsky* (and in appeals herein below) are still before this Court (see Petition in *Barsky, et al.* v. *United States*, No. 766, October Term, 1947).

Statutes Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

> "*Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who,

having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

"Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.

That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.' ''

3. 18 U. S. C. § 3486; R. S. § 859, as amended June 22, 1938, c. 594, 52 Stat. 943.

''*Testimony before Congress; immunity*

No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.''

Counter-Statement

The indictments which charged the respondents herein are, in substance, the same as that in *Barsky, et al.* v. *United States* (*supra*). Respondents Fleischman and Bryan were tried separately.*

The indictments charged the respondents with a misdemeanor of personally committing a contempt of the Committee on Un-American Activities of the House of Repre-

* A more complete statement of facts is to be found in the Petition for Writ of Certiorari in *Barsky, et al.* v. *United States of America*, No. 766, October Term 1947, still pending in this Court.

sentatives of the 79th Congress (sometimes herein referred to as the "House Committee") on April 4, 1946. The allegations of each indictment proclaimed a violation of 2 U. S. C. 192.*

The indictments arose from an investigation of the Joint Anti-Fascist Refugee Committee ("JAFRC"), a licensed unincorporated relief association (B. J. A. 303-328, 540-3)** by the said House Committee.

The respondent Fleischman was a member of the Executive Board and respondent Bryan was employed as the Executive Secretary of JAFRC.

It appears that on December 4, 1945, the House Committee issued a document which by its terms commanded the Sergeant at Arms to summon the respondent Bryan or Dr. Edward Barsky, the Chairman of the JAFRC Executive Board, to testify before it on December 19th and to produce at that time "all books, records, papers and documents" concerning JAFRC receipts and disbursements "and all letters, memoranda or communications from, or with, any person or persons outside of the United States" (F. R. 108; see B. J. A. 221-222). Respondent Bryan was served with the aforesaid summons by a clerk of the House Committee on December 14 (B. J. A. 217, 22). On that day she and Dr. Barsky were instructed by a resolution adopted by unspecified and unnamed members of the Executive Board of the JAFRC to advise with counsel and to "take any additional steps necessary and pursue all means to maintain and protect the rights" of the JAFRC "from the unjustified attack" on the JAFRC by the House Committee "which we consider constitutes a threat to democratic procedure in the United States" (Gov. Ex. 9, F. R.

* The indictment (in the *Fleischman* case) also alleged a conspiracy in violation of 18 U. S. C. 88. Inasmuch as this count was dismissed no reference to this aspect of the indictment will be made hereinafter.

** The above citation is a reference to the Joint Appendix in *Barsky*.

241-2). The respondent Bryan appeared before the House Committee on or about January 24, 1946 but did not produce the summoned records (F. R. 109).

The following day a subpoena to Dr. Barsky was issued by Congressman Wood, as Chairman of the House Committee, to appear on January 30, 1946 to testify and to bring with him all records indicating all contributors to and disbursements by the JAFRC in 1944 and 1945, and all correspondence received and sent by the JAFRC from and to foreign countries (B. J. A. 223-225). This subpoena was served on January 28, 1946 and Dr. Barsky appeared on the adjourned date of February 13, 1946 (F. R. 109, B. J. A. 421-434). Two days prior to his appearance, five members of the Executive Board met* and a resolution was adopted** reiterating that the JAFRC cannot "be considered Un-American, subversive, or an attack upon the principles of our form of government" and instructing Dr. Barsky not to produce the summoned books and records (Gov. Ex. 10, F. R. 243-4). The respondent Fleischman was not present at that meeting and did not vote on the resolution; and the respondent Bryan, being only an employee, did not, of course, vote.

At the February 13th hearing before the House Committee, Dr. Barsky was questioned and testified but did not produce the summoned books and records (F. R. 109).

Thereafter the House Committee, on March 29, 1946, issued 16 individual mandates addressed to the "Sergeant at Arms", or his "Special Messenger", to summon 16 named persons to appear and testify before the House Committee on April 4, 1946 (F. R. 106-7, 140-1). The par-

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* Dr. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Manuel Magana, and Prof. Lyman R. Bradley (F. R. 243).

** The minutes of the meeting indicate that 7 other members of the Board voted in absentia; Howard Fast, Mrs. Marjorie Chodorov, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsly, Mrs. Charlotte Stern and Dr. Jesse Tolmach (F. R. 244).

ties to be summoned, including respondent Fleischman, comprised all the members of the JAFRC Executive Board except Dr. Barsky and John T. McManus; and the respondent Bryan. Each mandate, in terms, further instructed the Sergeant at Arms to bring with *him* all books and records of the JAFRC from January 1, 1945 to April 14, 1946 concerning JAFRC receipts and disbursements, and JAFRC correspondence with persons in foreign countries during that same period (F. R. 97, 140-1). Service was made on the respondent Fleischman on March 29, 1946 (F. R. 98), and on the same date the respondent Bryan was served with such a subpoena addressed to the JAFRC (B. R. 31-2A).

Ernestina Fleischman appeared on April 4, was sworn and testified, but she did not produce the records summoned (F. R. 123ff). None of the other witnesses produced those records (F. R. 110, 142). In explanation of her action, the respondent Fleischman submitted a statement which indicated that Helen Bryan as Executive Secretary of the JAFRC had custody and control of the documents sought and was responsible for the production or non-production thereof (F. R. 125).

Helen Bryan also appeared that day and refused to produce the books and records (F. R. 142). In a written statement which she sent to the Committee she informed the Committee that she considered that it had no constitutional right to the books and records and that the production thereof would publicize recipients of JAFRC funds and "put in jeopardy the lives of those members of their families who are at the mercy of the Franco dictatorship" (B. J. A. Gov. Ex. 6, pp. 103-105).

The foregoing action of respondents before the House Committee at the hearing of April 4, 1946 is the subject matter of the instant prosecution.

On March 31 of the next year, 1947, respondent Fleischman together with all the members of the JAFRC Execu-

tive Board except John T. McManus were indicted by the Grand Jury on two counts: for an alleged conspiracy; and for an alleged contempt, after having been cited by the House of Representatives for their alleged wilful and deliberate refusal to produce the aforementioned books and records. Respondent Bryan was indicted on the substantive count alone (B. R. 1-2).

At the outset of the *Fleischman* trial the conspiracy count of the indictment was dismissed in view of the determination upon the *Barsky* trial that there was no evidence to sustain the charge (F. R. 9, 287). Each respondent was convicted of the substantive charge, and was sentenced to imprisonment for three months and fined $500 (F. R. 7; B. R. 19).

At the trials, the prosecution attempted to show the presence of a quorum at the April 4 hearing (F. R. 144 ff; B. R. 47 ff) and respondents, on cross-examination and in their motions, requests, and objections, put in issue the presence of such a quorum. Upon appeal, respondents assigned as error the following Trial Court instruction to the jury in each case; "as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance" (F. R. 283; B. R. 59-60). In the *Fleischman* case, the Court also instructed the jury "that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation" (F. R. 283). In the *Bryan* case, the Court advised counsel that it held as "a matter of law" that a quorum was present when the defendant appeared before the House Committee (B. R. 62).

The Court of Appeals for the District of Columbia, one Judge dissenting, reversed each judgment on the ground that the presence of a quorum of the House Committee at

the hearing of April 4 was a material question of fact in the alleged offense and should have been submitted to the jury.*

The United States of America, on June 3, 1949, petitioned for a writ of certiorari and said petition was granted October 17, 1949. The issue on which certiorari was granted, though of the utmost importance to the respondents and to the Government, is, nevertheless, peripheral. There are presently pending and there remain for decision in *Barsky* and by the same token in *Bryan* and *Fleischman* additional questions as the same are set forth and argued hereinafter.

Summary of Argument

A Congressional Committee, like any other agency of government, cannot be obstructed or impeded in its investigations unless it is in existence and organizationally capable of functioning. To impede such an agency of government does not depend on the means used; there is no distinction to be drawn between obstruction by perjury or obstruction by failure to produce documents. An agency of government incapable of being impeded by the former means cannot be impeded by the latter.

In a criminal case, the point of lack of quorum of a congressional committee which renders said committee organizationally incapable of being impeded, may be appropriately raised at the time of trial.

Because additional issues were presented to the United States Court of Appeals for the District of Columbia Circuit, and because the reversals of the judgments in these causes by that Court did not necessitate reaching said issues, they are argued herein.

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* Judge EDGERTON, the author of the majority opinion on the quorum question, further found that since no evidence was produced that respondent Fleischman had the power or ability to produce the records subpoenaed, the Trial Court erred in refusing to direct a verdict of acquittal in her case. PROCTOR and PRETTYMAN, *JJ.*, were of a contrary view on this point and so the Court of Appeals reversed on the instructions alone.

The substance of these causes was particularly related to the employment of some of the jurors. Said jurors, being employees of the Government and subject to Executive Order 9835 (popularly referred to as the "Loyalty Order"), should not have been permitted to sit as members of a jury called upon to pass judgment on persons charged with having committed a contempt of Congress. The United States was more than the nominal plaintiff in these prosecutions; in an adversary proceeding the employees of one party should not be permitted to sit on the jury.

18 U. S. C. 3486 specifically prohibits the use of testimony by witnesses before a Congressional Committee as evidence in subsequent prosecutions, except in a case of perjury. The testimony of the respondents was received in evidence, over objection, and in violation of said section.

The charge of the Trial Court in both causes on the meaning of the word "wilful" was error insofar as it obviated the obligation of the Government to prove a specific intent to commit the crime of contempt.

The issue of aiding and abetting, not charged in the indictments in these causes, should not have been submitted to the Jury. An aider cannot be guilty unless there is a principal who has committed the substantive crime. As the issue was left to the Jury, the respondent Fleischman may have been convicted for aiding and abetting, although there was no principal.

The rulings of the Trial Courts required compliance by each respondent who was served with an alleged subpoena and who "alone or in concert . . . had custody or control over" records. A subpoena *duces tecum* need be complied with only where actual custody is in the hands of the party served. A person subpoenaed need not "sue and labor" to obtain books and records not in his possession.

The Resolution establishing the House Committee is on its face and as applied unconstitutional.

POINT I

The instructions of the Trial Courts that, as a matter of law, a quorum of the House Committee was in attendance when respondents appeared, were error; the judgments of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

From the beginning the complaint of the United States of America has been that the two women who are respondents herein, criminally impeded and obstructed the activity of an agency of Government. The offensive conduct with which Ernestina G. Fleischman and Helen R. Bryan were charged was violation of that statute which deals with "Refusal Of Witnesses To Testify" before a Committee of Congress (2 U. S. C. 192). More specifically, the violation alleged was the wilful default by "a person . . . summoned as a witness . . . to produce papers" (2 U. S. C. 192) before the House Committee on Un-American Activities.

In our view, an agency of Government cannot thus or otherwise be thwarted and frustrated, if its existence and right to act as an agency of Government is not an established fact at the time of the offense. This Court in *Christoffel* v. *United States*, 338 U. S. 84, and the Court of Appeals for the District of Columbia Circuit as well (in these very causes), have affirmed this view.

The petitions of the United States for writs of certiorari and the brief in support thereof assail the decisions herein on two grounds. *First*, it is said that there is a distinction to be drawn between impeding and obstructing a Congressional Committee by means of false testimony and impeding and obstructing by means of refusal to produce papers; *second*, it is said that it is immaterial that the agency of Government allegedly thwarted was not in existence and not endowed with a right to act if the offending

parties did not assert these conditions as facts at the time of their offensive conduct.

Neither theory is correct. The first fails for lack of appreciation of the fact that impeding and obstructing an agency of Government does not depend upon the means used, but rather on the result. Non-disclosure of pertinent testimony or documents is not less offensive or contumacious than false testimony. Both are calculated to achieve the same result. In each case, however, the offending conduct will fail to achieve that result if, in fact, the agency of Government is either non-existent or organizationally incapable of being impeded at the time of the offense.

The second theory fails for lack of appreciation of the fact that "Witnesses in committee hearings cannot be required to be familiar with the complication of parliamentary practice [and] even if they are, the power to raise a point of no quorum appears to be limited to members of a committee" (*Christoffel* v. *United States*, 338 U. S. 84, 88). It is, therefore, apparent that in a criminal case affecting the rights of persons who are not members of the Congressional Committee, the occasion of trial was an appropriate one to point out the inherent disability of a multiple member agency to exist or act absent a quorum.

A.

The Rule Of *Christoffel* v. *United States*, 338 U. S. 84, Is Applicable Here.

PRETTYMAN, *J.*, dissenting herein below, and the United States of America, in its brief, take the view that the instant causes present no problem in any way analogous to the quorum question in perjury cases. The United States of America offers the rationale of the dissenting Justice in support of its present effort to distinguish *Christoffel* v. *United States* from the causes at bar. Thus, the dis-

sent below proclaimed that "There is no analogy. Perjury is an affirmative act. The accused must do something; he must testify falsely. . . . I see no analogy to the offense of failing to act." *Fleischman* v. *United States*, 174 F. 2d 519, 524. The United States, in its brief (p. 14), echoes this view as follows:

> "The essence of the offense charged was a *wilful failure to act* where a duty to act existed. While such failure to act may be proved, and was here proved, by evidence of certain positive acts, nevertheless the actual offense, unlike the offense of perjury, consists of something negative rather than affirmative—a failure to do that which an illegally imposed duty requires to be done".

This purported distinction, upon analysis, disappears.*

The crimes of contempt and perjury are analogous for each involves an obstruction of the inquiry at hand—of the search for truth. It is immaterial that the perjury which obstructs an inquiry is false testimony or non-disclosure of the truth. It is equally immaterial that the contempt which obstructs an inquiry arises from action or inaction. It is important in both instances only that the inquiry is thwarted.

Thus, this Court has heretofore observed that perjury is not only akin to but the equivalent of criminal contempt when it serves to obstruct a particular inquiry. *Ex parte Hudgings*, 249 U. S. 378. And in a case where the offender was "condemned for that she made use of false swearing . . .", CARDOZO, *J.*, writing for a unanimous Court, upheld

* Indeed, in the argument before this Court in *Christoffel* v. *United States* (in which the present counsel represented the petitioner) the Department of Justice, by Assistant Attorney General Campbell, in response to a question from Mr. Justice BLACK, stated that there was no distinction between the necessity for a quorum in perjury cases and the necessity for a quorum in contempt cases. Moreover, in the trial of the *Fleischman* case the Government apparently recognized no distinction because it assumed the burden of proving the presence of a quorum (see *Fleischman* v. *United States*, 174 F. 2d 519, 520 (footnote 5); F. R. 144; and see B. R. 47).

a conviction for criminal contempt and stated: "On the other hand obstruction to judicial power will not lose the quality of contempt though one of its aggravations be the commission of perjury". *Clark* v. *United States,* 289 U. S. 1, 12. In its decision in the latter case, this Court took the view that "what is punished is misconceived unless conceived of as a unit, the abuse of an official relation by concealment and deceit. This is contempt whatever it may be besides" (289 U. S. 1, 12).

The logic of the situation, as well, eliminates any distinction between the crimes of perjury and criminal contempt when considering the question of quorum. If a tribunal is not competent so as to support a charge of obstruction by perjury, it is not such a tribunal as may be obstructed in any other fashion. Thus, in a case where the indictment was for impeding and corrupting justice before a multiple member judicial tribunal, it was held that the indictment was insufficient for failure to *allege* a quorum of the court (*State of Vermont* v. *Freeman,* 15 Vt. 722).

"The orderly and efficient dispatch of Congressional business" depends, in the first instance, on fulfilling the Congressional requirements prerequisite to acting as an agency of Government. If a Congressional Committee is not empowered to meet or take action then the obstruction and impediment to any inquiry on which it is embarked flows from this inherent disability rather than from any action or inaction on the part of those summoned to appear before it.

The rule in respect to Committees of the House of Representatives is perfectly clear. The presence of a quorum must be affirmatively shown before the Committee has any status (VIII *Cannon's Precedents* 2222) and "no measure or recommendation [may] be reported from any such Committee unless a majority of the Committee were actually present" (Legislative Reorganization Ast of 1946, 60 Stat. 812 § 133(d)). Indeed, "The absence of a quorum of the

Committee, though at the time unobjected to", makes "effective action impossible" (*Christoffel* v. *United States*, 34 U. S. 84, 87; VIII Cannon's Precedents 2212). This being evident, it follows that an agency organizationally effective by these standards cannot be obstructed at all, whether by contempt or perjury.

If the House Committee, on the return day of the purported subpoenaes herein, was organizationally without power to receive documents, then it could not be deprived of information.* A refusal to produce documents before a House Committee which is not met and which is therefore unauthorized to receive them is no more contempt than a lie is perjury under similar conditions. Unless the Committee was in existence no compliance with the summons was possible. The question of whether the Committee was in existence, being vital, required a determination by the jury. In the Trial below this question was taken from the Jury and decided, as a matter of law against the respondent.**

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* In any event, in the instant cases, it was not deprived of any such record by the respondents. The purported subpoenaes allegedly dishonored read:

> "By authority of the House of Representatives of the Congress of the United States of America, to the *Sergeant-at-Arms* or his *special messenger*:
>
> *You* are hereby commanded to summons Mrs. Ernestina G. Fleischman . . . to be and appear before the un-American Activities Committee of the House of Representatives of the United States, of which the Honorable John S. Wood is Chairman, *and to bring with you* all books, ledgers, records and papers . . ." (F. R. 97).

The mandate to produce documents was addressed to the Sergeant-at-Arms or his special messenger and *not* to the respondents.

** The offense charged here is that of contempt allegedly committed before the House Committee on April 4, 1946 (F. R. 5). The position of the Government, maintained throughout its brief, that the only question presented here is whether the respondents produced documents, is not entirely accurate. The Trial Court by instructions to the Jury in *Fleischman* (F. R. 286) placed before it the question of respondent's having aided and abetted others (or another) to commit the offense. (Whether this alleged aiding or abetting consisted in part or in whole of respondents' actions before the Committee need not be the subject of speculation. The question of aiding and abetting was presented to the jury as was the respondents' testimony before the Committee.) This conduct could have status only if the Committee was properly constituted. The Court's ruling that it was relevant is error unless a quorum was present. Thus, whether the offense of respondents be viewed as an alleged contempt or

To the novel doctrine of anticipatory contempt advanced by the Government (Brief, p. 15), there are strong answers. To begin with, neither Fleischman nor Bryan announced any intention to defy the alleged subpoena for April 4. In the second place, even if they had announced any such intention they might well have changed their minds. To excuse the Committee from sitting because of a pre-hearing declaration of intent to commit an offense without actually having the offense committed is to recognize a doctrine of anticipatory contempt, which is unknown and repugnant to our concept of criminal justice.

A person who proclaims his intended disobedience of a Congressional subpoena may not be held in contempt unless and until he fails to comply with the subpoena and a threat to refuse to testify before a committee, no matter how widely publicized or how strongly proclaimed, is not contempt until a proper subpoena has been served and the witness has failed to appear before the committee as required. Surely a witness may not be held in contempt if, after being served with a subpoena but before the time for compliance, the committee recess indefinitely or is dissolved. And if one or both of the respondents had proclaimed in New York their intent to disobey the subpoena, in the presence of many witnesses, but then actually appeared in Washington before the House Committee at the time and place called for in the subpoena, they could not be in contempt. At the very least a *locus poenitentiae* must be offered them.

In any event, the necessity for a quorum, rather than being a "futile and time-consuming gesture" as suggested in the Government's brief (p. 15), is required by Congres-

as aiding and abetting a contempt which occurred on April 4, the Government has failed to prove its case unless the alleged refusals on April 4th to produce the summoned books and records constituted the crime of contempt (or unless respondent Fleischman aided some other witness before a properly constituted Committee who were in contempt thereof on April 4) (*Yonkichi Ito* v. *United States*, 64 F. (2d) 73, *cert. den.*, 289 U. S. 762; *Morgan* v. *United States*, 159 F. (2d) 85; and see *United States* v. *Howitt*, 55 F. Supp. 372, 374, aff'd 150 F. (2d) 82 aff'd 328 U. S. 189).

sional enactment (Rule XI(2)(f) and Rule XV of the House of Representatives, Legislative Reorganization Act of 1946, 60 Stat. 812, § 133(d) and see *Christoffel* v. *United States, supra*).

The contention that "The demand for documents could be satisfied merely by turning them over to the Clerk of the Committee, regardless of whether the Committee was in fact sitting at the moment" (Brief for the United States, p. 16), even if it be assumed that a Congressional Committee could delegate its powers and, indeed, its status to its clerk, is not here relevant. The purported subpoena was not returnable before the Clerk. The respondents were to be summoned by the Sergeant-at-Arms or his special messenger "to be and appear before the un-American Activities Committee" (F. R. 97) and not the Clerk of said Committee. Moreover, as has been pointed out hereinabove (see footnote, p. 15), the purported subpoena was directed to the Sergeant-at-Arms ("to bring with *you* all books, ledgers . . .") and not the respondents. Compliance with the purported subpoena could not be achieved either by the Sergeant-at-Arms or the respondents "merely by turning them over to the Clerk of the Committee".

Blair v. *United States,* 250 U. S. 273, 282, cited by the Government (Brief for United States, p. 15) is hardly persuasive. There the witness did not challenge the organization, existence, or competence of the Grand Jury; he raised constitutional questions relating to the jurisdiction of a Federal Grand Jury. This Court ruled he had no right to make this challenge provided the Grand Jury "have a de facto existence and organization" (*Blair* v. *United States,* 250 U. S. 273, 282). Had the challenge been to the organization of the Grand Jury,—had there been no quorum —the witness could have made the challenge by the familiar remedy of mandamus. Had there been no quorum of the Grand Jury, then, on mandamus, the action of the Grand Jury could have been stopped because in fact that is the

rule in respect to Grand Juries.* In the cases at bar a challenge to the organization of the agency of government cannot be advanced by the device of mandamus. There is no other agency of government, the mandate of which can supervise or control the affairs of a Congressional Committee.

From all of the foregoing, it is apparent why the majority in the Court of Appeals below ruled that "appellant, summoned to produce records before the Congressional Committee could not comply with the summons unless the Committee met. Production before some members of the Committee, absent a quorum, would not be a compliance. So much is clear and undisputed. Unless the appellee could comply with the summons she could not be guilty of wilfully making default. Failure to do what could not be done is not a wilful crime. Neither is failure, however expressed, to desire and attempt it. The appellant could not be guilty of anything more than this unless the Congressional Committee met." *Fleischman* v. *United States,* 174 F. 2d 519, 520.

B.

It Was Neither Necessary Nor Possible For The Respondents To Raise The Point Of Lack Of Quorum At The Time Of The Offense.

The Brief for the United States argues (at p. 18, *et seq.*) that because no point of lack of quorum was raised by the respondents or by a member of the House Committee

*"No evidence can be taken unless at least sixteen are present. It is important that the Secretary keep a record at each session of the number of Grand Jurors in attendance and the number voting on a Bill, and preserve his records in case a question arises as to whether a prerequisite number, to wit, sixteen were in attendance, * * * If only sixteen Grand Jurors are present and one leaves the room, taking of evidence must be suspended until his return. The Foreman may temporarily excuse a member, provided the number remaining in attendance shall be at least sixteen." *Handbook for Federal Grand Jurors, Southern District of New York,* issued by Federal Grand Jury Association for the Southern District of New York, Second Edition 1939, p. 7.

at the time of the hearing, the point may not be raised at any time subsequent.

This view is in diametric opposition to the recent ruling of this Court in *Christoffel* v. *United States*. The same contention is made now by the United States as was made then (see Brief of United States in *Christoffel* v. *United States*, p. 16, *et seq.*, especially at p. 23). In the latter case it was demonstrated that under the rules of the House of Representatives and in compliance with Section 310 of Jefferson's Manual, Rules on Manual of the United States House of Representatives 1947, only a member of a Committee had the right to raise the point of no quorum. This Court has decided that "the power to raise a point of no quorum appears to be limited to members of the Committee" (*Christoffel* v. *United States*, 338 U. S. 84, 88). As a consequence it has been determined that "in a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one . . . to raise the question".

Moreover, the Brief of the United States herein states that "though respondents had the benefit of advice of counsel prior to the hearing . . . at no time was any suggestion made by them, by any other witnesses, or by their counsel that a quorum was not present" (Brief for the United States, p. 19). The plain fact is that though the respondents may have had the benefit of advice of counsel *prior* to the hearing, the record is clear that counsel was not permitted to attend upon the hearing (F. R. 146) and the argument heretofore expressed indicates that the advice of counsel would have been rendered academic in any event. For as this Court has said: "Witness in Committee hearings cannot be required to be familiar with the complications of parliamentary practice" (*Christoffel* v. *United States*, 338 U. S. 84, 88). Witnesses are not usually informed of the number of members on a particular Congressional Committee, nor are they able to keep a perpetual

inventory of those present or to distinguish between those present in the capacity of Congressmen and those present in the capacity of clerks and attendants. In addition, citizens generally are not aware of the proportion of a Committee necessary to establish a quorum.

The rule of *Carman* v. *Emerson*, 71 Fed. 264, 267, alluded to in the Brief for the United States (at page 20), is hardly applicable here. The excerpt quoted from that decision reveals the factors which distinguish the cited case from the instant ones. In the cited case the offending party failed to attend at all and the excuse for not attending had nothing to do with the constitution of the body requiring his attendance, but had to do rather with the personal situation which reportedly exempted the witness from attending.

The United States commends the statements of Mr. Justice JACKSON in his dissenting opinion in *Christoffel* as a guide to the disposition of these causes. It is clear from the excerpt of Mr. Justice JACKSON's remarks that his concern was with an attack on Congressional rules, practices and records by subsequent oral testimony; his expressed fear was that duly enrolled legislation might in this fashion be invalidated. Even in *Christoffel* the petitioner did not assert an argument which would permit invalidation of duly enrolled legislation and the decision of this Court in *Christoffel* has no such effect.

In any event, there is no question, in these causes, that subsequent oral testimony was received to challenge the validity of Committee records. In *Christoffel* there were some documentary records evidencing the attendance of a quorum of the Congressional Committee. Here the transcript reveals no Committee journal, no tally slips and no attendance record. The sole evidence submitted by the Government in support of the attendance of a quorum was itself subsequent oral testimony. Under the circumstances

the Government and this Court need show no concern for or encourage a reversal of the rule recently established in *Christoffel*. In the first place, as indicated, the fears of Mr. Justice JACKSON that the rule would lead to the invalidation of duly enrolled legislation are unreal; and in the second place, these causes hardly afford the opportunity to overrule *Christoffel* for that problem is not presented by the record below (as there were no official records of the Committee to be challenged here).

POINT II

The judgment of the Court of Appeals should be affirmed for additional reasons not passed upon by the Court of Appeals.

In reversing the judgments of the Trial Court herein the Court of Appeals for the District Court of Columbia Circuit found it unnecessary to reach other questions of equal importance. "We need not consider the questions raised in the *Barsky* case or whether Government employees were qualified jurors" (*Fleischman* v. *United States*, 174 F. 2d 519, 521). Thus a review of important questions was by-passed.

Now comes the United States and presents only the quorum question to this Court for its determination. Though no reversal of the Court of Appeals is anticipated, it is deemed important to note that were such a reversal to occur, the respondents would have been denied an opportunity for review of other important issues.*

* This would eventuate unless any reversal herein was accompanied by a mandate to the Court of Appeals to reconsider the appeals herein with respect to the issues not previously considered. These issues include the effect of the presence of Government employees on the Jury, the effect of receiving in evidence statements of respondents made before the House Committee, the error in charging as to the definition of the term "wilful" as that word is used in 2 U. S. C. 192, the error in the charge with respect to aiding and abetting and the error in respect to the charge on "custody and control".

Rule 38(2) of the Supreme Court states in part "only the questions specifically brought forward by the petition for a writ of certiorari will be considered." See *Flournoy* v. *Wiener*, 321 U. S. 253; *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350. This rule does not bar consideration of the important issues hereinabove referred to, for the reason that, as construed by this Court, its applicability is limited to questions raised by the petitioner rather than by the respondent. As long as the respondent does not attack the validity of the decision below, any question raised by the pleadings or record or which have been argued in inferior courts, may be presented to this Court, even in the absence of a cross-petition for certiorari. *Walling* v. *Central Industries Co.*, 330 U. S. 545, 547; *Langnes* v. *Green*, 282 U. S. 531, 538; *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 509; *Cole* v. *Ralph*, 252 U. S. 286, *Letulle* v. *Scofield*, 308 U. S. 415, 421. For these reasons additional questions are argued herein.

A.

The Trial Courts Committed Reversible Errors In Refusing Respondents' Requests To Discharge All Government Employees From The Jury; This Error Was Not Reviewed By The Court Of Appeals.

At the beginning of the trials in each of the causes below the respondents moved to exclude all Government employees from the Jury (F. R. 17 *et seq.*; B. R. 27) and in each instance this motion was denied (F. R. 32; B. R. 28-29). In both causes, the respondents having exhausted their peremptory challenges, Government employees, including Army and Navy personnel (F. R. 38, 71; B. R. 27, 28), sat upon the Jury which convicted.

It was apparent to the Trial Court and to prospective jurors as well when the cases were identified by the gov-

ernment attorney (F. R. 33 *et seq.*) that the indictments obliged a trial of issues that were at once delicate and volatile. The respondents were charged with having committed contempts of a Congressional Committee and it was public knowledge that the particular Committee (on Un-American Activities) was on the search for and engaged in an effort to expose so-called subversive activities. It was equally apparent that the respondents were associated with an organization listed by the Attorney General as "subversive" (pursuant to Executive Order No. 9835, popularly referred to as the "Loyalty Order").

It was particularly known to civil servants that sympathetic association with or approval of ideas advanced by organizations thus listed was enough to taint the loyalty status of such employees and influence their continued employment by the Government.

It does not need extended argument to demonstrate that a government employee serving on a Jury in an adversary criminal proceeding, where the Government was more than the nominal representative of the public and where the charge was contempt of Congress, would find extreme difficulty in holding against the Government.

The question here presented to this Court is currently of the utmost importance. It has been presented to this Court before* and is before this Court now.**

The instant prosecutions present this question in its most refined form for these cases involve a conflict between a Committee of Congress, which played a large role in formulating and administering the so-called loyalty program and an organization which had come under its scrutiny. Indeed, the conflict is between an organization listed by the United States as subversive to it and the

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* In *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Wood*, 299 U. S. 123 and *Frazier* v. *United States*, 335 U. S. 97.

** In *Dennis* v. *United States*, October Term 1949 No. 436.

United States itself. In this conflict one of the parties, the United States, was represented on the Jury by employees whose loyalties were the object of its concern. When the trials herein were completed, a case involving an accused organization and the Government was left to a Jury whose members included employees of one of the parties. Under the circumstances the Jury did not have the politically dehydrated issue which the Government has heretofore contended was left to it (see Brief for the United States in the Court of Appeals for the District of Columbia Circuit, pages 8, 10-11, 13 and 14). The Government employee jurors were not only passing judgment in a case in which their employer was a party, but they were asked to determine innocence or guilt in a situation where the Government employee juror must necessarily pay heed to the risk that his decision might affect his own loyalty status.

Crawford v. *United States*, 212 U. S. 183, iterates the venerable rule which would disqualify a juror for cause if he is an employee of one of the parties (and see *Francone* v. *Southern Pac. Co.*, 145 F. 2d 732, 733). While it is true that a Government employee is not disqualified from serving as a juror in criminal cases where the United States is only the nominal plaintiff, on the complaint of a private person or corporation (*United States* v. *Wood*, 299 U. S. 123), it has become clearer in recent years that where the United States is more than the nominal plaintiff,—where the United States is really the complainant—a Jury, numbering amongst its members a Government employee is a defective Jury. *United States* v. *Wood, supra*, decided in 1937, pointed the way while upholding the right of Government employees to sit in judgment in some kinds of criminal cases. Prior to *United States* v. *Wood*, the state of the law was such that it probably was "a settled rule . . . that the mere fact of Governmental employment, unrelated to the particular issues or circumstances of a criminal

prosecution, created an absolute disqualification to serve as a juror in a criminal case". But the opinion of the Chief Justice of the United States in the *Wood* case terminated this absolute disqualification and suggested that the disqualification would come about only where the employment of the juror by the United States was related to the particular issues or circumstances of the prosecution. Thus, the Chief Justice stated "it is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical." *United States* v. *Wood*, 299 U. S. 123, 150. The guide then is that in a "special and exceptional" case a Government employee must be disqualified. The inquiry remains as to what is such a special and exceptional case.

Frazier v. *United States*, 335 U. S. 97, is helpful to this inquiry.

In determining when there is at hand such a case as would infringe upon the protection afforded by the Sixth Amendment to the Constitution, it is clear that "the Constitution lays down no particular tests and procedure is not chained to an ancient and artificial formula". In each case "a broad discretion and duty reside in the Court to see that the Jury as finally selected is subject to no solid basis of objection on the score of impartiality, even though that basis might possibly arise through the working of chance or other lawful factors wholly within the framework of proper procedures for selecting the panel and choosing the jury from it." *Frazier* v. *United States*, 335 U. S. 97.

The four dissenting Justices of this Court in the *Frazier* case, speaking through Mr. Justice JACKSON, have eloquently proclaimed the manner in which the constitutional protections of the Sixth Amendment were destroyed

below. For it is clear that in the trial of these causes the United States "at the same time that it made its plea to [the Jury] to convict . . . had the upper hand of [some] of them in matters such as pay and promotion".

"Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to '. . . crook the pregnant hinges of the knee where thrift may follow fawning.' So I reject as spurious any view that government employment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such a jury has a one-sided outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia."

The duty of the Trial Court to insure such impartiality as is called for in *Frazier* was most manifest in those causes. Precisely to the extent that it permitted government employees to sit, to that extent was its duty violated. The evidence left to the jury involved a conflict between an organization listed as subversive and the government which had an awful power over those jurors employed by it. This jury, if not a 'packed' jury was certainly one that had "a one sided outlook on problems before it."

The "special and exceptional case" referred to in *United States* v. *Wood, supra,* clearly is that case where, as here, the employment of a juror by the United States was closely related to the particular issues or circumstances of the prosecution. Here is the prime example of the necessity of imputing bias as a class to Government employee jurors.

Moreover, this is the kind of bias which can never be discovered or cured on the *voir dire.* It is of no aid whatsoever, in gathering an impartial jury, to have the assurance of a Government employee that he is not biased. Unless the jury panel in these cases was composed of an extraordinarily courageous group of employees, a matter upon which respondents should not be required to speculate, the failure of any government employee on the panel* to state or appreciate the "psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position" *Frazier* v. *United States,* 93 L. Ed. 175, 185) suggests that the Trial Judge did not—and could not—upon the *voir dire* achieve an unbiased and impartial jury. Government employees on the jury panel in this case should have been disqualified without engaging in the futile enterprise of

* While a substantial portion of the jury panel in these causes consisted of government employees none of those employees professed any bias in favor of their employer and the superveillor of their loyalty, the United States Government.

ascertaining the minds and atitudes of those employees by means of the general, abstract questions employed upon the *voir dire.*

It is respondents' position that wherever a Government employee may *plausibly* construe the issue in a prosecution as one involving the loyalty of the defendant and, therefore, may *plausibly* conclude that his decision as a juror might be deemed a manifestation of his own loyalty as a Government employee, he should not be permitted to sit as a juror. If a juror can *plausibly* consider that his status as a "loyal American" is in the balance when he casts his vote as a juror, he is no longer free to decide the case before him exclusively upon the facts and the law.

Such a situation prevailed in this case and it is this situation which brings the case within the "special and exceptional" category referred to in the *Wood* decision. It was, therefore, prejudicial error to deny respondents' motions to dismiss Government employees from the Jury.

B.

It Was Reversible Error To Admit The Testimony Of Respondents Before The House Committee In Evidence.

Over objection of respondents (F. R. 116; B. R. 33), based upon the express and explicit statutory provision that testimony before a Congressional Committee may not be used against witnesses in subsequent criminal proceedings (18 U. S. C. § 3486), the Trial Court permitted the Government to read to the Jury testimony by the respondents before the House Committee (F. R. 123, *et seq.*; B. R. 33 *et seq.*).

The authorities are clear that testimony such as that dealt with by Section 3486 may not be admitted into evidence in a prosecution for perjury (*Cameron* v. *United*

States, 231 U. S. 710, 721) or contempt (*Wakefield* v. *Housel*, 288 F. 721; *In re Haley*, 41 F. 2d 379) where the giving of the testimony does not itself constitute the crime charged. "The crucial question, it seems, is whether the act which constitutes the offense is one disclosed by the testimony or whether it is the testimony itself" (Note, 15 *U. of Chic. L. R.* 442, 443); where the testimony is the crime it is admissible, otherwise it is not.

The foregoing formulation stems from the balancing of individual constitutional rights and the needs of effective government.

The exclusionary rule provided by Section 3486 is derived from the constitutional privilege against self-incrimination. Of necessity, therefore, though it is intended to aid the government by encouraging witness to testify without fear of criminal sanctions, it imposes a restraint and a burden upon the government in its prosecutions. The United States cannot be heard to argue that Section 3486 should be disregarded because it imposes such a restraint and such a burden. Moreover, since the respondents could not have been compelled to testify over a claim of privilege (*Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *De Lorenzo*, 151 F. 2d 122, 124; *United States* v. *Barsky*, 72 F. Supp. 165, 167), a loose construction at this time of the rights of respondents under this section would amount to entrapment (*United States* v. *Monia*, 317 U. S. 424).

On the other hand, it may be that Section 3486 does not permit crimes inherent in or committed by the actual testimony to go unpunished. Thus, whether by express provisions or by statutory construction, perjurious testimony may be admitted in a perjury prosecution based upon that testimony where the defendant invokes an exclusionary statute such as Section 3486. *Glickstein* v. *United States*, 222 U. S. 139; *Edelstein* v. *United States*, 149 F. 636. And in that rare situation where the testimony itself is the con-

tempt for which the witness is prosecuted, perhaps the testimony may be allowed. But beyond these exceptions, beyond permitting the Government to introduce the testimony which is itself the charged offense and, therefore, indispensable, if the offense is not to be unpunishable, the needs of the prosecutor may not be preferred to the constitutional rights and privileges of witnesses.

> "History denies that these restraints defeat the end of justice by crippling the prosecution and discouraging the detection of crime and the conviction of criminals. All they do defeat are the lazy habits of those police who prefer to use a whip rather than their wits to solve a mystery." Mr. Justice DOUGLAS, "Procedural Safeguards in the Bill of Rights," 31 *Journal of Amer. Jud. Society* 166, 168 (1948).

Accordingly, where, as here, the testimony offered is not the crime but offered only as an item of proof thereof, it was error to permit the testimony to go before the jury.

C.

The Charge Of The Trial Court As To The Meaning Of The Term "Willful" As Used In 2 U. S. C. 192 Was Error.

In both causes the charge to the Jury defined the term willful as "deliberate and intentional" (F. R. 286; B. R. 61). In both causes the charge to the Jury on this subject stated "the motive of the defendant in failing to comply with the subpoena and her reason for such failure are not material so long as you find that she did so intentionally and deliberately" (F. R. 286; B. R. 61).

These charges as to the meaning of "willful" are in error. As the reversal of the convictions herein were predicated on other grounds, this error was not considered by the Court of Appeals.

The charges on "willful" referred to are in evident conflict with applicable decisions of this Court insofar as they make proof of a specific criminal intent unnecessary. In prosecutions of the character of the instant ones, a specific criminal intent is an essential element of the crime. (*Screws* v. *U. S.*, 325 U. S. 91; *Hartzell* v. *United States*, 332 U. S. 680.) Insofar as the respondents conducted themselves at the time of the hearing before the House Committee in reliance upon advice of counsel and upon the honest and reasonable belief that the resolution creating the House Committee was unconstitutional or, in the alternative, that custody and control of documents was not with the respondent, it is apparent they had no specific intent to commit a "wilful default." (See *Keegan* v. *United States*, 325 U. S. 478; *United States* v. *Murdock*, 290 U. S. 389.)

D.

The Charge Of The Court In The Fleischman Case On The Subject Of Aiding and Abetting Was Error.

In view of the fact that Count 1 of the indictment against Ernestina G. Fleischman was dismissed in advance of the jury deliberation (F. R. 291) and in view of the further fact that Count 2 of the indictment on which the respondent was found guilty makes no reference to any crime except that of making wilful default (as a principal), the charge of the Court to the effect that "it is the law . . . if one person aids or abets, advises or counsels or encourages another to commit an offense, he is equally liable under the criminal law with the one who physically commits it" (F. R. 286), was error.

Quite apart from the fact that for the first time there was introduced into the trial the charge of aiding and abetting a contempt rather than committing it as a princi-

pal, (so that the respondent was not advised and could offer no proof as to the time of the aiding, the principal who was aided, or the place at which the aiding and abetting occurred), this charge is error because it is predicated on a situation where there was no proof either that there was a principal or that the alleged accessory did anything to aid or abet.

While it is true that the government showed some participation by the respondent Fleischman in the general activities of JAFRC, it is clear that it failed to prove that she was engaged in any Executive Board activity pertaining in any way to the production of the particular documents sought. For example, no evidence was adduced to indicate her presence on December 14, 1945 when the Executive Board, by resolution, acted so as to give instructions to the respondent Bryan on this problem (F. R. 242). Nor was it shown that she voted for, approved or ratified that resolution. On the contrary, it affirmatively appears that the respondent Fleischman was not present and did not vote at the meeting of the Executive Board which took place on February 11, 1945 and which by resolution instructed Dr. Barsky not to produce the summoned records (F. R. 219, 243-4). Indeed, it is clear that no witness placed the respondent Fleischman at *any* meeting of the Executive Board of JAFRC when said Board took action pertaining to the summoned records (F. R. 192, 200, 207, 210, 211, 212, 219, 228, 232). In addition the record affirmatively shows that no one saw or placed the respondent Fleischman at the offices of the JAFRC's attorney in connection with the statement she submitted or, indeed, in any connection (F. R. 209, 212).

In view of all of the foregoing there are persuasive reasons to support the opinion of EDGERTON, *J.* insofar as that opinion concluded that the Trial Court should have directed a verdict of acquittal (*Fleischman* v. *United States*, 174 F. 2d 519, 521).

In any event, whether the offense of respondent be viewed as an alleged contempt or aiding and abetting a contempt, the Government failed to prove its case, unless it proved that the respondent by what she did before the Committee (assuming a quorum of the Committee was present), aided and abetted another to commit a contempt before a properly constituted Committee. It nowhere appearing that others committed a contempt, the respondent would not have been one who aided or abetted such a contempt.*

E.

It Was Error For The Trial Court To Rule That Respondent Fleischman Was Obliged To Comply With The Alleged Subpoena *Duces Tecum* If She Alone Or With Others Had Custody Or Dominion And Control Of The Subpoenaed Books And Records.

At the conclusion of the Government's case the respondent Ernestina G. Fleischman moved for an acquittal upon the ground, among others, that the Government had not proven that she had custody of the subpoenaed books and records (F. R. 256, 257). This motion was denied (F. R. 279). At the conclusion of the trial the court charged the jury that the respondent Fleischman was required to comply with the alleged subpoena *duces tecum* and should be found guilty of contempt for non-compliance if the jury determined

> "3. That the defendant, alone or in concert with one or more of the defendants, had custody or dominion and control over such records" (F. R. 286).

Respondent Fleischman objected to this part of the charge, among others (F. R. 290).

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* (*Yenkichi, Ito* v. *United States*, 64 F. 2d 73, *cert. den.*, 289 U. S. 762; *Morgan* v. *United States*, 159 F. (2d) 85; and see *United States* v. *Howitt*, 55 F. Supp. 372, 374 aff'd 150 F. (2d) 82 aff'd 328 U. S. 189.)

The court's charge is based upon a theory which extends a person's responsibility under a subpoena *duces tecum* to a point never previously reached by any court.

The courts have consistently held that a subpoena *duces tecum* need be complied with only where actual custody is had of the documents requested; a party thus subpoenaed need not "sue and labor" to obtain books and records he does not possess. *Amey* v. *Long*, 9 East 473 (K. B. 1808); *Munroe* v. *United States*, 216 Fed. 107; *In re Ironclad Mfg. Co.*, 201 Fed. 66; *United States* v. *American Tobacco Co.*, 146 Fed. 557; *In re Sykes*, 23 Fed. Cas. 13, 707; *Russell* v. *McLellan*, 21 Fed. Cas. 12, 158; *In re Harris*, 27 F. Supp. 480; *Commonwealth* v. *International Harvester Co.*, 148 Ky. 37.

The dictum of this Court in *Wilson* v. *United States*, 221 U. S. 361, 374, 376, to the effect that a subpoena *duces tecum* addressed to a corporation is "a command to those who are officially responsible for the conduct of its affairs", should not be extended to members of an unincorporated association or to a process which issues *ex parte* such as a subpoena *duces tecum*. Cf. *Commissioners* v. *Sellew*, 99 U. S. 624. In the *Wilson* case the subpoena was addressed to the organization and any individual responsibility flowing therefrom was created by virtue of the individual's position in the organization. In the instant case, however, the subpoena was addressed to the respondent as an individual and the only responsibility that can flow therefrom is that which normally flows from a subpoena *duces tecum* addressed to an individual. We have found no case of a subpoena directed to a corporation or an unincorporated association where any person has been held responsible for producing records not in his custody. Indeed, this Court in *Brown* v. *United States*, 276 U. S. 134, 142, said:

> "While the subpoena duces tecum directed to the officer in possession of the documents would have

been good, and perhaps preferable, the matter is not one of substance, but purely of procedure, and we entertain no doubt that the subpoena here directed to the association and *served on such officer is valid.*" (Italics added.)

It will be noted that the Court sustained the validity of a subpoena directed to an association only when served on "such officer", *i. e.*, the officer in possession of the documents.

Were the rule any broader than as has been stated, confusion would result in a field in which the law has been clear. The door would be open to the service of subpoenas not only upon the executive officers of the corporation who have custody of the books, but on the directors of such corporations, and even on the stockholders. The subpoena would be a means to compel the holding of meetings of boards of directors, or meetings of the stockholders of corporations, to secure the removal of any custodian who challenges the validity of a subpoena.

As applied to unincorporated associations, not only governing board members, but also individual members of clubs, associations and unions, would be subject to subpoena to compel them to call meetings to require custodians of records to produce the records or transfer them to other custodians willing to produce. Such an unwarranted expansion of the scope of the subpoena would create a precedent substituting "shotgun" techniques into a field heretofore clearly and simply understood.

POINT III

The judgments of conviction were properly reversed by the Court of Appeals for the District of Columbia in that the Resolution upon which the aforesaid convictions are ultimately premised is on its face and as applied unconstitutional.

These causes are pregnant with other important issues, the constitutionality of the resolution establishing the House Committee on un-American Activities and the abuse by the Committee of its powers under said resolution. Except in this court's discretion, argument on these issues may not be properly made for the reason that such argument is, in a strict sense, an attack on the judgment of the Court of Appeals which ordered a new trial and not a dismissal. However, inasmuch as these issues are presently pending before this Court in *Barsky* v. *United States, cert. den.*, 334 U. S. 843 (Petition for rehearing pending) and inasmuch as these issues will be or have been presented to this Court in *Lawson* v. *United States* and *Trumbo* v. *United States*, October Term 1948, No. 334, and in view of the power of this Court in its discretion to consider such an argument (*Langnes* v. *Green*, *supra*, p. 22), these issues are developed for such consideration as this Court may wish to give them.

Upon the Petition for Writ of Certiorari in the companion *Barsky* case and in the Petition for Rehearing and the Supplemental Briefs in Support of the Petition for Rehearing in *Barsky*, there have been submitted to this Court complete and extensive arguments demonstrating that the Resolution pursuant to which the House Committee on Un-American Activities acted herein violates the First, Fifth, Sixth, Ninth and Tenth Amendments to the United States Constitution. The arguments and au-

thorities cited in those briefs are applicable to the instant causes and this Court is respectfully referred to those briefs for a full statement of respondents' position concerning the constitutionality of the Resolution. In view, however, of the importance of the question of the constitutionality of the Resolution and the circumstance that this Court to date has not ruled upon the question, respondents briefly restate and summarize at this point for the consideration of the Court the reasons for their position that the Resolution on its face and as applied is violative of fundamental constitutional inhibitions contained in the Bill of Rights.

The experience of the House Committee on Un-American Activities over the course of approximately a decade and a half removes any doubt that that Committee and the Resolution under which it operates abridges freedom of thought, speech, press and assembly. This is accomplished by the use of compulsory process whereby witnesses are required to attend at Committee hearings and answer inquiries concerning their political beliefs, expressions, activities and associations; and by means of public dissemination by the Committee and its members of judgments concerning the "Americanism", "loyalty" or political orthodoxy of those persons under investigation. The technique of harrowing investigation and defamatory public judgments has proven in practice to constitute a most effective restraint and abridgment of First Amendment rights. Those persons investigated and "exposed" are plainly punished for activities and beliefs clearly within the protective confines of the First Amendment; and as the prohibitions of the First Amendment extend to subsequent punishment as well as prior restraints (*Thornhill* v. *Alabama*, 310 U. S. 88, 101, 102), punishment of the unhappy quarry of a House Committee investigation for prior political beliefs and affiliations may be considered an abridgment of First Amendment rights. Even more effective, however,

is the fashion in which the Resolution and the House Committee have imposed a prior restraint upon thought and expression. Motion picture producers fearful of the consequences of a hostile investigation and report by the House Committee on Un-American Activities have expressly stated their intention to select employees and produce films in accordance with the standards of political and social orthodoxy prescribed by the House Committee.* The restraint thus made explicit in the instance of motion picture producers has been implicit and immeasurable in the case of the radio, the press, and our schools—each of which institutions has had the benefit of the attention of the House Committee at different times (see H. R. 2233, 79th Cong., 2d Sess.; Gellerman, *Martin Dies* (1944) ch. 7; Note, 47 *Columbia Law Rev.* 416). Every major media of the dissemination of ideas and information has been the subject of investigation and, therefore, restraint by the House Committee which asks this Court to condone and implement its practices in the instant causes.

Nor is it to be supposed that the restraints and abridgment worked by the House Committee are either unauthorized or merely incidental to the Resolution. The terms of the Resolution are so broad, so vague, and so malleable to the whims and dictates of the personnel of the House Committee that no individual and no organization in this country may safely consider itself immune from the ubiquitous investigations of the House Committee. Indeed, the legislative history of the House Committee not only demonstrates that the scope of its activities has been ratified and authorized by the Congress by re-enacting the Resolution (83 Cong. Rec. 7567-7686; 84 Cong. Rec. 1098-1128; 86 Cong. Rec. 572-605; 87 Cong. Rec. 886-900; 88 Cong. Rec. 2282-2297; 89 Cong. Rec. 721-729, 795-810; 91 Cong. Rec.

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* See *Lawson* v. *United States*, Oct. Term 1948, No. 335, Joint Appendix 257-260, 312-316, 336-338, 480-545, and Petition for Certiorari at pp. 4-5; see also Kahn, *Hollywood on Trial*, *passim*.

10-14; 92 Cong. Rec. 7720-7728; 94 Cong. Rec. 2483-2496), but in addition "it may be said that Congress decided not to restrict the Committee by giving an explicit meaning to the authorizing enactments" (Note, 47 *Columbia Law Rev.* 416, 423).

As the Resolution on its face and as applied by the House Committee restrains and abridges First Amendment rights it would appear, at first glance, that the validity of that Resolution should be tested in terms of the "clear and present danger" standard to which this Court has continued to adhere as recently as the last Term. *Terminiello* v. *City of Chicago*, 337 U. S. 1. If that standard is here applicable, then the Resolution is plainly and concededly unconstitutional. For the majority opinion in *Barsky* failed to glean any clear and present danger in our nation which would justify the abridgments occasioned by the House Committee; instead, that opinion was predicated upon the existence of "some reasonable cause for concern" (167 F. 2d, 246). It is respondents' view that the Constitution permits no greater latitude in the abridgment of First Amendment rights by investigation and "exposure" than by other types of Congressional action. The need to investigate is no greater than the exigencies which underlie the exercise of the taxing power, the police power or, indeed, the power of national survival itself, yet each of the foregoing is delimited by the strictures of the First Amendment as realized in the "clear and present danger" test. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Grosjean* v. *American Press Company*, 297 U. S. 233; *Lovell* v. *Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293; *Bridges* v. *California*, 314 U. S. 252; *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *Bridges* v. *Wixon*, 326 U. S. 135; *Hartzel* v. *United States*, 322 U. S. 680; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353;

Herndon v. *Lowry*, 301 U. S. 242; *Taylor* v. *Mississippi*, 319 U. S. 583; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639. In any event, even in terms of the premise upon which the majority opinion in the *Barsky* case justified the investigation by the House Committee into the exercise of First Amendment rights, the conclusion does not follow that the Resolution is valid under the First Amendment.

For the history and the avowed purpose of the House Committee on Un-American Activities demonstrate that punishment by exposure and not legislation is its objective. See 94 Cong. Rec. 2495; Notes, 96 *U. of Penn. Law Rev.* 381, 396; 14 *U. of Chic. Law Rev.* 256, 259; 47 *Columbia Law Rev.* 416, 427; H. R. 2, 76th Cong., 1st Sess., p. 13; H. R. 1, 77th Cong., 1st Sess., p. 24; H. R. 2742, 79th Cong., 2nd Sess., p. 16.

The Basic defect in the Resolution is that it violates the First Amendment to the United States Constitution. But as the abridgment and suppression of free thought and expression required procedures violative of the most elementary notions of fair play during the Inquisition, and again during the late Fifteenth Century and early Sixteenth Century in England, and again during the New England witch-hunts of the Seventeenth Century, so has the House Committee found it impossible to accomplish its noxious efforts to destroy our freedoms without relying upon and employing procedures which do not and could not comport with the due process clause of the Fifth Amendment. Thus neither the Resolution establishing the House Committee nor any other related statute affords to witnesses before the House Committee or any other subject of the Committee's investigations any of the procedural safeguards which have been identified with due process of law: they are not entitled to the aid of counsel in the presence of the Committee; they are not entitled to examine the evidence against them; they are not entitled to cross-examine hostile

witnesses; they are not entitled to make an affirmative presentation of a defense to charges; and they are not entitled to limit the evidence presented to and disseminated by the Committee by the evidentiary rules against rumor, gossip, hearsay or biased testimony. In short, the Committee is authorized and does try and punish by public defamation individuals and organizations without affording those individuals or organizations any of the judicial or procedural safeguards implicit in due process of law; what Congress as a legislative body cannot do because of the prohibition against Bills of Attainer the House Committee has done. As the foregoing techniques of the House Committee lend themselves to abuses impinging upon First and Fifth Amendment rights it becomes particularly important that the scope of the investigatory power of the House Committee be precisely and definitively stated in the Resolution. The fact is, however, that the key terms of the Resolution are so broad and so nebulous that it constitutes a flagrant violation of the Fifth and Sixth Amendments to the United States Constitution.

The key term of the Resolution is "un-American propaganda activities". The opinions in the *Barsky* case indicate that the term "un-American" is vague and indefinite (167 F. 2d, 247; cf. *Feinglass* v. *Reinicke,* 48 Fed. Supp. 438). And this Court described as the term "subversive," another term used in the Resolution, as one of vague and uncertain content. *Winters* v. *New York,* 333 U. S. 507, 518. But the majority opinion in *Barsky* concluded that the Resolution was a valid delegation of power by the Congress to the House Committee since the instruction therein to investigate propaganda which "attacks the principle of the form of government as guaranteed by our Constitution" ". . . is definite enough . . ." (167 F. 2d, 247). This conclusion, however, does not dispose of respondents' contention that, irrespective of the sufficiency of the Resolution as a delegation of power, the Resolution, enforceable and here enforced by penal sanctions, is to be treated as a penal stat-

ute (*Kraus & Bros.* v. *United States*, 327 U. S. 614) and as a penal statute it violates the fifth and Sixth Amendments because its terms fail to provide the clear and definite standard of guilt required of such a statute. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *United States* v. *Reese*, 92 U. S. 214.

Indeed, even the terms deemed by the Court of Appeals as "definite enough" failed to convey to this Court any clear or fixed meaning in *Schneiderman* v. *United States*, 320 U. S. 118.

Any definite meaning which might be attributed to the phrase "propaganda that . . . attacks the principle of the form of government as guaranteed by our Constitution" is vitiated since it qualifies and is inseparable from the concededly vague term, "un-American propaganda activities." And even if the phrase relied on is separable in import from the balance of the Resolution, the vagueness of the other terms is decisive. For it does not appear from the record or otherwise that the JAFRC was being investigated under the purportedly definite portion of the Resolution. Since the determination of pertinency by the Trial Court was general and not geared to that portion of the Resolution which the Court of Appeals found to be definite and, therefore, valid, "the conviction cannot be upheld" if, as the Court of Appeals conceded, other portions of the Resolution are vague and therefore "invalid under the Federal Constitution." *Stromberg* v. *California*, 283 U. S. 359, 368.

The Court of Appeals held in the *Barsky* case that the Resolution provided witnesses with an adequate standard of guilt in that "the question addressed to those appellants was pertinent to the subject . . . of the resolution" (167 F. 2d, 248). But when it is considered that the terms used in the Resolution have no fixed or definite meaning, then

it must be concluded that the Resolution violates the Fifth and Sixth Amendments in that it exposed respondents to criminal sanctions without providing respondents, in advance, with fixed and definite standards whereby respondents could ascertain what acts would constitute the crime of contempt. The subsequent judicial determinations that the demand by the House Committee upon respondents was pertinent does not supply the Resolution with the clearly defined standard of guilt to which respondents were constitutionally entitled in advance of their appearance before the House Committee. 26 Cong. Globe, 34th Cong., 3rd Sess., pp. 439, *et seq.;* 8 Wigmore, *Evidence* § 2195, p. 80 (3 ed. 1940); Gose, "The Limits of Congressional Investigating Power" 10 *Washington Law Rev.* 61, 138, 153; Note, 47 *Columbia Law Rev.* 416, 425. Consequently, irrespective of whether the crime charged is judicially determined to be clearly within the statute defining the crime, the Resolution "violates an accused's rights under procedural due process" since the Resolution fails "to give fair notice to what acts will be punished" (*Winters* v. *New York*, 333 U. S. 507, 509) to "men of common intelligence" (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391).

Finally, it should be noted that this Court has heretofore defined and applied limits to the Congressional investigatory power. The limits as thus defined by this Court require the conclusion that the Resolution be declared invalid even apart from the considerations deriving from the First, Fifth and Sixth Amendments; the Resolution is invalid under the Ninth and Tenth Amendments to the United States Constitution in that it authorizes the exercise of power nowhere delegated to the Federal Government. This conclusion is reached upon a consideration of two controlling principles: on the one hand, this Court has recognized the basic constitutional right to the "exemption of [one's] private affairs, books, and papers from

the inspection and scrutiny of others." (*In Re Pacific Railway Commission*, 32 Fed. 241, 250 (FIELD, *J.*); *Kilbourn* v. *Thompson*, 103 U. S. 168; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1); on the other hand, the Congress has the power to investigate into the affairs of individuals and organizations as an aid to the functions assigned to the Congress by the Constitution (*Marshall* v. *Gordon*, 243 U. S. 521, 541; *Sinclair* v. *United States*, 279 U. S. 263, 291; *McGrain* v. *Daugherty*, 273 U. S. 135, 173; *In re Chapman*, 166 U. S. 661, 667; *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613; *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376, 388). The pragmatic resolution of these two principles may be accomplished by limiting the subject of Congressional investigation to matters within the Congressional constitutional power. Thus the functions of the Congress which may be assisted by investigation include: control by the Congress of its members (Art. I, § 5, Cl. 1, 2); impeachment (Art. I, § 3, Cl. 6); the power to make the appropriations required for the administration of the laws (Art. I, § 7, Cl. 1); and the formulation of legislation (Art. I, § 8) and it is therefore appropriate for Congress to inquire into elections or corruption of legislators (*In re Chapman*, 166 U. S. 661; *Reed* v. *County Commissioners of Delaware County*, 277 U. S. 376; *Barry* v. *United States*, 279 U. S. 597) and into the affairs of public officials or departments to determine whether the laws are properly administered (*McGrain* v. *Daugherty*, 273 U. S. 135; *Sinclair* v. *United States*, 279 U. S. 263). But it is not appropriate for the Congress to investigate into the private affairs of private persons upon the basis of some remote, speculative, possibility that legislation may ensue therefrom. *Kilbourn* v. *Thompson*, 103 U. S. 168, is the only instance where this Court considered an investigation which had for its defined scope the private affairs of private citizens. It was there held that if the investigation is

such "that it could result in no valid legislation on the subject to which the inquiry referred," the investigation would be declared "void for want of jurisdiction in that body." *Kilbourn* v. *Thompson*, 103 U. S. 168, 193, 196. Such a void investigation was held to be without the constitutional grant of power to the Congress contained in Article I, Section 1 or Article I, Section 8, Clause 18 and therefore in derogation of the powers reserved to the people and to the States by the Ninth and Tenth Amendments.

The scope of the investigation authorized by the Resolution is an unlimited inquiry into the private affairs of private persons and the Resolution is therefore unconstitutional because it does not relate directly to prospective valid legislation. It is not sufficient that the investigation may result in some valid legislation wholly incommensurate with its scope. Eberling, *Congressional Investigations* (1928) 383. The investigation considered in *Kilbourn* v. *Thompson*, as any investigation, contained some possibility of future legislation. See Landis, "Constitutional Limits on the Congressional Power of Investigation," 40 *Harvard Law Rev.*, 153, 216-217. The right of security for the private affairs of private citizens prohibits an extensive Congressional inquiry into those matters on the slight pretext of a mere possibility of future legislation. The only legislation to which the House Committee investigation is plausibly related is legislation affecting political expression and opinion. The remarkable paucity of legislation produced by this Committee and its predecessors is indicative of what may be expected in the future. For that paucity of legislation is not due to any lack of diligence on the part of the House Committee; the real block is the Bill of Rights. The House Committee has repeatedly stated that the objective of the House Committee is not to produce legislation but to accomplish by publicity and "exposure" what it could not constitutionally accomplish by legislation. See

Note, 47 *Columbia Law Rev.*, 416, 427 n. 110. An investigation which, at best, abridges speech in an effort to determine whether and what speech may be abridged is in violation of the Ninth and Tenth Amendments. ——

CONCLUSION

For all of the foregoing reasons, the judgments reversing the convictions of respondents and ordering new trials should be affirmed.*

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

98 Nos. 98 and 99 99

UNITED STATES OF AMERICA

v.

ERNESTINA G. FLEISCHMAN,

Petitioner.

UNITED STATES OF AMERICA

v.

HELEN R. BRYAN,

Petitioner.

PETITIONS FOR REHEARING

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PETITIONS FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray for a rehearing and a reversal of the order of this Court dated May 8, 1950 wherein this Court reversed the judgments of the Court of Appeals for the District of Columbia, which latter Court had reversed the judgments of conviction of the petitioners herein and ordered a new trial. These petitions for rehearing are based upon substantial grounds available to petitioners although not previously presented.

I

The Court should consider and pass upon the contention of petitioners that the Trial Courts committed reversible errors in refusing petitioners' requests to discharge all government employees from the juries.

In their briefs to the Court of Appeals for the District of Columbia the petitioners herein urged that it was reversible error to refuse their request to discharge all government employees from the jury panels (see BR* 17, ff. 32; FR** 27A, 28A-29A). The Court of Appeals did not rule upon the foregoing contention for the reason that that Court concluded that the convictions had to be reversed on other grounds. Thereafter, the foregoing contention was again urged by the petitioners herein before this Court in petitioners' briefs and upon the oral argument. It was open for the petitioners to make this contention before this Court, although the petition for certiorari did not comprise the question of the propriety of the presence of government employees on the jury, since petitioners were authorized to present any argument tending to sustain the judgment of the Court of Appeals. *Walling* v. *Central Industries Co.*, 330 U. S. 545, 547; *Langnes* v. *Green*, 282 U. S. 531, 538. This Court, however, in reversing the judgments of the Court of Appeals did not reach or pass upon the question of the propriety of permitting government employees to serve on the juries which convicted petitioners, although this Court did reach and decide certain other questions which had not been passed upon by the Court of Appeals. The jury question, and those other questions which the Court stated that "we do not decide . . . at this time", are among the questions which

* The *Bryan* record is referred to as "BR" herein.
** The *Fleischman* record is referred to as "FR" herein.

will have to be now passed upon by the Court of Appeals upon the remand of these cases to that Court for the consideration of those matters not passed upon either by the Court of Appeals or the Supreme Court.

Petitioners urge, however, that, instead of requiring petitioners to re-argue the jury question before the Court of Appeals, awaiting decision thereon, and then re-presenting that issue to this Court, the instant petitions for rehearing be granted and that the jury question be set down for argument before the full Court, including Mr. Justice DOUGLAS. In the decisions by this Court in *Dennis* v. *United States*, 18 U. S. Law Week 4194, and *Morford* v. *United States*, 18 U. S. Law Week 4235, it has become plain that Mr. Chief Justice VINSON and Mr. Justices BURTON, REED and MINTON consider that government employees as a class need not necessarily be disqualified for bias from serving on a jury which has before it the question whether a witness has committed contempt of the House Committee on Un-American Activities. Mr. Justices FRANKFURTER, BLACK, JACKSON and DOUGLAS apparently consider that such bias must be imputed to government employees as a class in such a case. Mr. Justice CLARK, having disqualified himself from sitting in the instant cases, could not participate upon a rehearing of this case. Consequently, under the decisions of this Court, it would appear that if the jury questions in these causes were considered by the Court the judgment of the Court of Appeals for the District of Columbia would be affirmed because of the even division of the Justices. For this reason it is proper and appropriate that petitioners not be required to reargue the instant causes before the Court of Appeals when the Justices of this Court have already plainly manifested their positions on this issue which positions, if followed, would require an affirmance of the reversal of the convictions by the Court of Appeals.

II

It was error to sustain the rulings of the Trial Courts which took from the juries the material, disputed issue of fact whether a quorum of the House Committee was present at the time of the alleged defaults.

A

In the *Bryan* case this Court held that it was unnecessary for the prosecution to prove the presence of a quorum of the House Committee, at the time of the alleged contempt, in order to present a *prima facie* case of an offense under Section 192 of Title 2 of the United States Code. Section 192 makes illegal the willful failure "to give testimony or to produce papers upon any matter under inquiry before . . . any Committee of either House of Congress". The Court concedes, in accordance with its earlier decision in *Christoffel* v. *United States*, 338 U. S. 84, that if this phrase signified the failure "to give testimony or produce papers . . . before any Committee of either House of Congress", it would be necessary to prove the presence of a quorum as a material element of the offense; but the Court reads the words "before . . . any Committee of either House of Congress" to qualify the expression "any matter under inquiry" rather than the phrase "to give testimony or to produce papers".

The basic defect in the Court's construction of Section 192 is that under such a construction of Section 192 witnesses could be compelled not only "to give testimony or to produce papers" "before . . . any Committee of either House of Congress", but at any place and before any body or agency. The expression "before . . . any Committee of either House of Congress" must necessarily define and localize the place where witnesses must appear to testify and produce papers for otherwise the compulsory power

of committees of Congress is virtually unlimited as to place or location.

In any event, however, irrespective of the manner in which the offense is defined by the statute, the prosecutions of Bryan and Fleischman were predicated upon a default of certain identified and specific subpoenaes. No matter what the statute might require, if the subpoena is the instrument which has been disregarded the offense is described and defined by that instrument. And this Court assumed that the subpoenaes call for testimony before the House Committee *qua* Committee. Consequently, as the instant prosecutions were for a default of those subpoenaes, it necessarily follows that an essential element of the crime which must be proved by the prosecution is the presence of a quorum of the Committee at the time when the alleged defaults occurred.

B

The Court also ruled that, whatever right one prosecuted for testimony given by him as a witness before a Congressional committee may have to raise upon the trial for the first time the lack of a quorum where he did not raise the lack of a quorum before the Congressional committee, ". . . under the circumstances disclosed by this record a defense of a lack of quorum was not open to respondent". The "circumstances" in both causes which thus were construed to waive the rights of petitioners to the defense of the lack of a quorum was the failure of either petitioner to assert such a lack of quorum before the House Committee and, in the case of the defendant Bryan, the fact that she indicated that she was refusing to produce the books and records for reasons other than the absence of a quorum. Ordinarily this Court does not readily spell out a waiver of a right as fundamental as the right to raise as a defense that an agency, obstruction of which is a crime only when it is in existence *qua* agency of government, was not thus

in existence when obstructed. *Glasser* v. *United States*, 315 U. S. 60, 70; *Aetna Life Ins. Co.* v. *Kennedy*, 301 U. S. 389. Nor should such a waiver be readily implied with respect to testimony before Congressional committees for while there may be a great public interest in the right to compel testimony before a Congressional committee, there is as great a right or a greater right of all persons to be let alone in their private matters and affairs—a right which is clearly limited and impinged upon by the House Committee on Un-American Activities. Thus petitioners respectfully submit that it was error for this Court to spell out a waiver from the single circumstance in the *Fleischman* case that the lack of quorum was not raised before the Committee* and from the further circumstance, in the *Bryan* case, of the assertion of another ground for non-production of the books and records.** At the least, the waiver of a fundamental right requires that the party who has purportedly waived his rights does so with full knowledge of the rights which he is supposed to have waived. Certainly a witness before a Congressional committee who, as the petitioners here, were without the benefit of counsel or in any other assistance while before the Committee (see F. R. 146), and who, while before the Committee, were badgered and harassed and unaware of their rights, and who, further, as a matter of law, had no right to raise a point of quorum, may not be considered to have waived their rights to object to a lack of quorum. These peti-

* In *Christoffel* it was held that the mere failure to raise the lack of quorum at the time that the witness appeared before the Congressional committee is not a waiver of the right to raise the lack of quorum subsequently upon a criminal prosecution arising out of the witness' testimony. In the case of *Fleischman* the only act committed by her which might be deemed a waiver of her right to raise the lack of a quorum for the first time upon a criminal trial was the fact that she did not raise the point of quorum when she testified. Since this does not constitute a waiver under *Christoffel*, this Court, which apparently considers *Christoffel* to remain good law, was in error in reversing the Court of Appeals in *Fleischman*.

** Similarly, under *Christoffel*, this fact does not spell out a waiver. For if it can be said that Bryan would not have produced the records even in the presence of a quorum it can, by the same reasoning, be said that Christoffel would have given the same testimony even if a quorum had been present when he testified.

tioners were hardly in a position to know what constituted a quorum, whether a quorum was present, and whether they could raise objections to the lack of a quorum. Under such circumstances, it was error for this Court to conclude that these petitioners had waived their right to raise as a matter of defense the lack of a quorum.

CONCLUSION

It is respectfully prayed that these petitions for rehearing be granted and that upon such rehearing the orders of this Court herein be reversed.

Respectfully submitted,

ERNESTINA G. FLEISCHMAN,
HELEN R. BRYAN,
Petitioners.

O. JOHN ROGGE,
BENEDICT WOLF,
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Certificate

Counsel for petitioners certify that these petitions for rehearing are presented in good faith and not for delay, and that the petitions are restricted to the grounds above specified.

O. JOHN ROGGE,
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